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An appeal lies to the High Court against an order of the District Judge granting sanction under clauses 6 and 7 of section 195 of the Code of Criminal Procedure where such order has revoked the sanction granted by the Munsif for prosecution under certain sections of the Indian Penal Code but granted sanction to prosecute under other sections; and it is competent to the High Court on appeal, therefrom, not only to revoke the sanction granted but also to grant the sanction refused.	
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It is desirable that the High Court, in refusing a certificate for leave to appeal to His Majesty in Council, should state their reasons for refusing it.	
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2. Stay of execution of decree pending appeal—To what Court application should be made—Power of High Court to grant stay of execution up to determination of Privy Council appeal—Order of Judicial Committee granting stay of execution where High Court had not done so :	
Application for stay of execution of a decree pending an appeal to His Majesty in Council should always be made, in the first instance at any rate, to the Court in India which has ample power to deal with the matter according to the circumstances of the particular case, and has knowledge of details which the Judicial Committee cannot possess on an interlocutory application. In this case the High Court were of opinion that they had no power to grant a stay of execution up to the determination of the appeal by the Privy Council, but their judgment showed that they thought it ought to be granted; and the Judicial Committee allowed such a stay of execution upon terms.	
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ARBITRATION—Award to be filed in Court having jurisdiction over the matter submitted—Award not invalidated by want of notice nor by the arbitrators accepting a fee—Jurisdiction.

The omission to give notice of the meeting of the arbitrators to a party who had, prior to such meeting, notified to the arbitrators his withdrawal from the submission, does not invalidate an award; nor does the fact that the arbitrators, at the suggestion and with the consent of all parties accepted remuneration for their trouble, make the award illegal. The Court having jurisdiction to file the award is determined by the value of the matter to which the arbitration related, and not by the amount actually allowed under the award. *Narsingh Das v. Ajodhya Prosad Sukel*, (I.L.R., 31 Calo., 203), referred to.

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ATTACHMENT—Existence of decree at time of attachment necessary to make it valid :

An attachment in execution, whether made by the Court which passed the decree or by the Court to which such decree had been transferred for execution, is null and void, if at the time of attachment the decree had been set aside and was non-existent; and a renewed decree, in the same terms as the original decree, passed subsequently will not validate it.

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CATTLE TRESPASS ACT, ss. 20, 22:—See "CRIMINAL PROCEDURE CODE, s. 4."

CIVIL PROCEDURE CODE—ACT XIV OF 1882—One of two joint decree-holders recovering the whole amount liable to the other for his share:

Although a payment to one of two joint decree-holders of the whole decree amount does not, even when certified, absolve the judgment-debtor from liability to the other decree holder, such decree-holder is not bound to proceed against the judgment-debtor in execution, but may sue to recover his share from the other decree-holder.

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2. **s. 13—Res judicata must be based on the grounds stated in the judgment:**

A plea of *res judicata* must be based on the grounds of the decision actually stated in the judgment; and where such grounds are unequivocally stated but do not justify the decision, it is not proper or competent to substitute something else quite different which will justify it to enable one of the parties to found a plea of *res judicata*.

Jalasutram Lokshminarayan v. Bommadevara Venkata Narasimha Naidu ... 42

3. **s. 13—Res judicata—Decrees in cross-suits on same facts—Appeal against one decree only—Decree unappealed no bar to the decision of the appeal:**

Where cross-suits between the same parties on the same facts were tried together and judgment was given on the same day, but separate decrees were passed and an appeal was preferred against one of the decrees alone:—*Held*, that the decree unappealed did not operate as a bar under section 13 of the Code of Civil Procedure so as to preclude the Appellate Court from dealing with the decree appealed against. The doctrine of *res judicata* has no application when the very object of the appeal, in substance if not in form, is to get rid of the decision which is pleaded in bar. *Abdul Majid v. Jew Narain Mahto*, (I.L.R., 16 Calc., 233), followed.

Panchanada Velan v. Vuithinatha Sastrial ... 333

4. **s. 13—Res judicata—'Of competent Jurisdiction' meaning of—Decision against which no second appeal allowed, no bar to suit open to second appeal:**

The words 'of jurisdiction competent' in section 13 of the Code of Civil Procedure admit of the provisions of law relating to appealability being considered in giving effect to the principle of estoppel, which ought to be so applied that, so far as possible, Courts of higher jurisdiction are not tied down by the decisions of inferior Courts. A decision in a previous suit of a small cause nature, in which no second appeal is allowed by law is no bar to a subsequent suit, in the same Court, which not being of a small cause nature is open to second appeal. *Subbammal v. Huddleston*, (I.L.R., 17 Mad., 273), overruled. *Ahmed v. Moidin*, (I.L.R., 24 Mad., 444), overruled. *Raja Simhadri Appa Row v. Ramachandrudu*, (I.L.R., 27 Mad., 63), overruled. *Namasivayya Gurukkal v. Kadir Ammal*, (I.L.R., 17 Mad., 161), followed. *Mussamut Edun v. Mussamut Bechun*, (8 W.R., 175), referred to. *Misir Raghobardial v. Sheo Baksh Singh*, (I.L.R., 9 Calc., 439), referred to.

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5. *investigation' under s. 283, what is—Payment of decree amount more than one year after order, effect of—Decision on question of mixed law and fact res judicata—Voluntary payments not recoverable :*
 A claim to attached property by A was dismissed by the following order :—" The sale seems collusive. Claim rejected." The order was apparently made on a consideration of the sale-deed alone and there was nothing to show that any evidence was gone into. More than a year after the order B, claiming the properties under a sale by A subsequent to the order, paid the decree amount and the attachment was raised. In a suit by A to redeem the lands on the strength of his title under the sale dealt with by the order :—*Held*, that as the order on the claim by A, purported to be made on the merits, it was valid as one made after 'an investigation' of the claim within the meaning of the word as used in the Code : *Held further*, that the order was conclusive between A and the defendants and that the payment of the decree debt by B, having been made more than a year after the date of the order did not relieve A from the obligation to bring a suit within a year to set aside the order. A judgment in a previous suit between the same parties not based on a misapprehension as to a general rule of law but deciding a question of mixed law and fact is binding as *res judicata* in a subsequent suit. *Sardhari Lal v. Ambika Pershad*, (I.L.R., 15 Calc., 521), followed. *Umesh Chunder Roy v. Raj Bullubh Sen*, (I.L.R., 8 Calc., 279), distinguished. *Krishna Prosad Roy v. Bippin Behary Roy*, (I.L.R., 31 Calc., 228), distinguished. *Gopal Purshottam v. Bai Divali*, (I.L.R., 18 Bom., 241), distinguished. *Parthasaradi v. Chinna Krishna*, (I.L.R., 5 Mad., 304 at p. 309), distinguished.
Koyyana Chittamma v. Doosy Gavaramma 225
6. *Claim in the alternative against debtors and agent of plaintiff :*
 The plaintiff, in a suit to recover money from certain persons alleged to have borrowed money from his agent, is entitled when the alleged debtors deny the loan, to make his agent a co-defendant, and pray for a decree in the alternative against such agent. Such claims are made in respect of the same matter within the meaning of section 28 of the Code of Civil Procedure. *Muthappa Chetty v. Muthu Palani Chetty*, (I.L.R., 27 Mad., 80), distinguished.
Meyappa Ghetti v. Perianman Chetti 50
7. *on one mortgage no bar to subsequent suit on another mortgage of same property :*
 A suit brought by A against B on an alleged mortgage, which was dismissed, is no bar to another suit by A against B on another mortgage in respect of the same properties under sections 43 and 13 of the Code of Civil Procedure. *Rangasami Pillai v. Krishna Pillai*, (I.L.R., 22 Mad., 259), overruled. *Ramaswami Ayyar v. Vyithinatha Ayyar*, (I.L.R., 26 Mad., 780), followed. *Veerana Pillai v. Muthukumara Asary*, (I.L.R., 27 Mad., 102), followed.
Thrikaikat Madathil Raman v. Thiruthiyil Krishnen Nair 153
8. *service can only be made when defendant keeps out of the way or where the summons cannot be served in the ordinary way :*
 Whenever it is practicable, the service of summons must be in person under sections 73 and 75 of the Code of Civil Procedure ; and it is only when reasonable grounds exist for believing that the defendant is keeping out of the way to avoid service, or that for other reasons it cannot be served in the ordinary way, that substituted service should be ordered. *Subramania Pillai v. Subramania Ayyar*, (I.L.R., 21 Mad., 419), followed. *Sankaralinga Mudali v. Ratnasabhapati Mudali*, (I.L.R., 21 Mad., 325) distinguished.
Abraham Pillai v. Donald Smith 324

9. *1889, ss. 16 (a), 18 and 27—No compensation under section 18 when license cancelled under section 27 :*
 Where a license has been cancelled under section 27 of the Madras Salt Act IV of 1889, the licensee is not entitled to compensation under section 18 of the Act, but only to the value of the proprietary right under section 16 (a) of the Act. Where such licensee has obtained a decree for possession of salt pans in default of payment of proper compensation, it is competent to the Court in execution proceedings to determine the amount so payable ; and no separate suit need be brought to determine such amount.
The Collector of Chingleput for the Secretary of State for India v. Subraya Mudaliar 181
10. *ss. 244, 246—Person attaching decree representative of decree-holder under s. 244—Decree directing sale of property for money due is a decree for money within the meaning of s. 246 :*
 One who attaches a decree is a representative of the decree-holder for the purposes of section 244 of the Code of Civil Procedure and an appeal lies from orders in execution proceedings disposing of questions arising between him and the judgment-debtor, relating to the execution of the decree. *Sah Mandlull v. Kanagasabapathi*, (I.L.R., 16 Mad., 20), followed. A decree directing the plaintiff to recover the decreed amount by sale of properties but not directing payment by the defendant is essentially a decree for money. The provisions as to set off, in section 246 of the Code of Civil Procedure, will apply to such decrees. *Vandhinathasamy Ayyar v. Somasundaram Pillai*, (I.L.R., 28 Mad., 476), followed.
Krishnan v. Venkatapathi Chetty 318
11. *ss. 244, 318—Purchaser of undivided share must sue for partition by separate suit—Section 244 no bar to such suit :*
 The purchaser at a Court sale of the share of an undivided member of a joint Hindu family acquires only a right to sue for partition and for delivery of what may be allotted as the share of such undivided member. The Court cannot on a mere application for execution by such purchaser enforce his right by an order for partition. No such order can be made under section 318 of the Code of Civil Procedure and the dismissal by the Court of an application by the purchaser under section 318 cannot be a bar to a suit by the purchaser for partition. Section 244 of the Code of Civil Procedure is no bar to such a suit.
Yelumalai Chetti v. Srinivasa Chetti 294
12. *s. 258—Uncertified judgment cannot be taken notice of by Court :*
 An adjustment of a decree out of Court which is not certified to the Court cannot, under section 258 of the Code of Civil Procedure, be pleaded as a bar to execution. *Pernatambi Udayan v. Fellaya Goundan*, (I.L.R., 21 Mad., 409), followed. *Ramayyar v. Ramayyar*, (I.L.R., 21 Mad., 356), referred to.
Ganapathy Ayyar v. Chenga Reddi 312
13. *ss. 258, 462—Adjustment of decree by guardian without leave under s. 462 cannot be certified under s. 258 of the Civil Procedure Code :*
 The provisions of section 462 of the Code of Civil Procedure apply to compromises after decree and no adjustment by compromise of a decree by the guardian of a minor can be certified under section 258 of the Code of Civil Procedure when the guardian had not applied for leave to enter into the compromise under section 462 of the Code.
Arunachellam Chetty v. Ramanadhan Chetty 309

14. *s. 260—Decree for perpetual injunction, execution of—Limitation Act XV of 1877, sch. II, art. 178—Application in time if within three years of breach complained of—Court executing decree, powers of—Cannot go behind decree:*
Where a perpetual injunction has been granted, on each successive breach of it the decree may be enforced under section 260 of the Code of Civil Procedure by an application made within three years of such breach under article 178, schedule II, of the Limitation Act. The decree-holder is not bound to take action in respect of every petty infringement; and the injunction does not by his inaction become inoperative after three years from the date of the first petty breach so as to disentitle him to take action where a serious breach is afterwards committed. Where the terms of a decree are clear, the executing Court is bound to give effect to it and cannot read into it limitations gathered from a reference to the records of the suit.
Venkatachallam Chetty v. Veerappa Pillai ... 314
15. *s. 283—Suit brought under s. 283 not liable to dismissal because no further relief asked—Specific Relief Act I of 1877, s. 42:*
The special right conferred by section 283 of the Code of Civil Procedure on a claimant, whose claim is rejected, to sue for a declaration of his title in so far as it is affected by the order passed against him is not controlled by the proviso to section 42 of the Specific Relief Act; and the plaintiff in such a suit is not bound to ask for any further relief to which he may be entitled. *Kunhiamma v. Kunhuni*, (I.L.R., 16 Mad., 140), overruled. *Ambu v. Kellilamma*, (I.L.R., 14 Mad., 23), followed.
Kristnam Sooraya v. Pathmz Bee ... 15
16. *s. 373—Court has power to extend time for payment of costs:*
Where a party has been permitted to withdraw from a suit with liberty to bring a fresh suit if he should pay costs within a named date under section 373 of the Code of Civil Procedure, the Court has power to extend the time for payment when it is absolutely impossible for the party to pay such costs on or before the day so fixed.
Peria Muthirian v. Karappanna Muthirian ... 370
17. *s. 457—Guardian ad litem, appointment of married woman as—Compromise by guardian, validity of:*
The appointment of a married woman as guardian ad litem in a suit instituted against a minor is a mere irregularity and a compromise by such guardian under proper advice when sanctioned by the Court cannot be set aside on any ground which would be insufficient to set aside a compromise between persons *sui juris*. *Mussammam Bibi Walian v. Banke Behari Pershad Singh*, (I.L.R., 30 I.A., 182), and *Brooke v. Lord Mostyn*, (2 DeG. J. & S., 373 at p. 416), referred to and followed.
Kachayi Kuttiali Haji v. Udampumthala Kunhi Putlu ... 58
18. *ss. 525, 520, 526—Order to file or refusing an application to file an award appealable—Award determining matters not referred cannot be filed:*
An order made on an application under section 525 of the Code of Civil Procedure to file an award, whether such prayer is granted or refused, is a decree and appealable as such. *Ponnusami Mudali v. Mandisundara Mudali*, (I.L.R., 27 Mad., 255), followed. Where an award determines matters not referred to arbitration, the Court, under sections 520 and 526 of the Code of Civil Procedure, is bound to refuse to file the award.
Thiruvengadathiengar v. Vaidinatha Ayyar ... 303
19. *Act, SCHED. II, ARTS. 175 (e), 178.* *s. 582, 587;—See "LIMITATION*

20. *s. 584—Power of Court on second appeal to examine evidence of usage—Custom—Ryot, right of, to trees:*
A ryot holding lands in a zamindari on a permanent tenure would, as regards land on which a money assessment is paid, be *prima facie* entitled exclusively to the trees thereon. Where the crops are shared between the ryot and zamindar, they will be jointly interested in such trees, but such presumptions may be rebutted by proof of usage or contract to the contrary. *Narayana Ayyangar v. Orr*, (I.L.R., 26 Mad., 252), followed. Although the provisions of section 584 of the Code of Civil Procedure disallow a second appeal with reference to findings of fact, yet, the existence or non-existence of a usage having the force of law is unaffected by such disallowance. Consequently, it is the duty of the Court, when it has to pronounce an opinion upon such question to examine the evidence bearing on it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it. Custom in India is transcendent law. A custom cannot be established by a few instances or by instances of recent date. Observations on the nature of evidence necessary to support custom. *Eranjoli Vishnu Nambudri v. Eranjoli Krishnan Nambudri*, (I.L.R., 7 Mad., 3), followed. *Hurry Churn Dass v. Nimai Chand Keyal*, (I.L.R., 10 Cal., 138), not followed. *Bai Shrinbai v. Kharshedji*, (I.L.R., 22 Bom., 430), not followed.
Kakarla Abbayya v. Raja Venkata Papayya Rao ... 24
- CHITFUND:—See "INDIAN COMPANIES ACT, s. 4."**
- COMPROMISE—Compromise presented but not decreed—Order to proceed with suit puts an end to such compromise—Procedure in sanctioning compromise on behalf of minors:**
Where a compromise had been presented but no decree had been passed in accordance with its terms, and the Court subsequently, at the instance of one of the parties, ordered the suit to be proceeded with on the issues framed before the compromise and on other issues, the compromise must be deemed to have been put an end to and the Court cannot, at subsequent stage, treat the compromise as subsisting and proceed to pass a decree upon it. In sanctioning compromises on behalf of minors, the order should state in terms that the question whether the compromise was for the benefit of the minors was considered.
Govindasami Naidu v. Alagirisami Naidu ... 104
- CONSTRUCTION OF STATUTE:—See "CRIMINAL PROCEDURE CODE, ss. 222, 234."**
- CONTRACT ACT IX OF 1872, s. 74, Expl., Effect of—Mortgage—Simple mortgage, personal liability under exists unless special contract to the contrary—Absence of specific prayer in plaint no ground for refusing appropriate relief—Delay no abandonment of right:**
In the case of simple mortgages, the personal liability of the mortgagor exists, unless there is a specific contract to the contrary. *Wahid-un-Nissa v. Gobardhan Das*, (I.L.R., 22 All., 453 at p. 481), referred to. Where the plaint asks for a decree against the defendants as members of the family and 'for such other relief as the Court may think fit,' the Court ought to grant the plaintiff such appropriate relief as he is entitled to and such relief cannot be refused on the ground that there is no specific prayer for such relief. Though it is within the scope of the authority of the managing member of a Hindu family to execute the mortgage so as to bind the family assets, the plaintiff in a suit on such mortgage is not entitled to a personal decree against a defendant member of the family who is not a party to the mortgage in respect of the money alleged to be in his hand. Mere delay by the plaintiff in suing to enforce a contract is no evidence of an intention not to enforce its terms. Under the explanation to section 74 of the Indian Contract Act, it is for the Court to decide on the facts of the particular case whether a stipulation for increased interest from the date of default is or is not a stipulation by way of penalty. It was not

the intention of the Legislature to enact that such stipulations are always to be considered penal. The explanation was simply intended to meet the decisions in which it was held that such stipulations are not penal and must be enforced.

Abbakke Heggadthi v. Kinhiamma Shetty ... 491

2. *74—Not applicable to forfeiture of deposits—Forfeiture, no relief against, if amount reasonable:*

Neither section 74 of the Indian Contract Act, nor the principles of law laid down in decisions dealing with promises to pay specified sums in case of breach of contract apply to cases of forfeiture of deposits for breach of stipulations even when some of them are but trifling, while others are not such. *Wallis v. Smith* (L.R., 21 Ch. D., 243 at p. 258). In such cases the rule is that where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with if reasonable in amount. *Srinivasa v. Rathnasabapathi*, (I.L.R., 18 Mad., 474), not followed.

Manian Patter v. The Madras Railway Company ... 118

COPYRIGHT ACT—XX OF 1847, s. 14—Act XXV of 1867—Law under s. 14 of Act XX of 1847 same as law in England—No copyright in published work except where copyright registered and subsists:

The law as settled in England is that in the case of a book which has been published, there is no right to sue for piracy except where the copyright is registered and subsists under statutory provisions. Copinger on 'Copyright,' pages 29 and 33, referred to. *Macklin v. Richardson* and *Goubaud v. Wallace*, (7 Ruling Cases, 66 at pp. 67, 70 and 128 respectively), referred to. The law is the same in India. The proviso to section 14 of Act XX of 1847 has not effected any change in the law as stated above and does not protect copyright in published works when not registered under Act XX of 1847 or Act XXV of 1867. *Macmillan v. Suresh Chunder Deb*, (I.L.R., 17 Cal., 951), distinguished.

Subapathy Mudaliar v. Seetharamiah ... 292

COURT FEES ACT—VII OF 1870—Ad valorem fee chargeable on appeals against decrees under section 330 of the Code of Civil Procedure:

Where a claim under section 330 of the Code of Civil Procedure has been registered as a suit, an appeal against the decree directing delivery of property in such suit ought to be stamped with an *ad valorem* fee.

Balasundra Mudelly v. Rajalingam Chettiar ... 172

2. *s. 7 (e), cl. IX, and art. I of sched. I—Art. I of sched. I of the Act applies to appeals in mortgage suits—Court-fee payable on subject-matter in dispute in the appeal:*

Section 7 (e), clause IX of the Court Fees Act, applies only to "suits" and not to appeals. In the case of appeals in mortgage suits article I of schedule I of the Act applies. The Court-fee in such cases is payable on the value of the subject-matter in dispute in the appeal and not of the subject-matter in dispute in the suit. *Nepal Rai v. Debi Prasad*, (I.L.R., 27 All., 447), followed. *Umarkhan v. Mahomed Khan*, (I.L.R., 10 Bom., 41), dissented from.

Reference under Court Fees Act ... 367

CUSTOM:—See "RYOT."

CRIMINAL PROCEDURE CODE—ACT V OF 1898, s. 4 (o), AND THE CATTLE TRESPASS ACT I OF 1871, ss. 20, 22—Appeal lies against order made under s. 22 of the Cattle Tresspass Act:

By section 4 (o) of the Code of Criminal Procedure, the word 'offence' includes an act in respect of which a complaint may be made under section 20 of the Cattle Tresspass Act; and a person against whom an order

under section 22 of the Cattle Tresspass Act is made is a "person convicted on a trial" and is entitled to appeal under section 407 of the Code of Criminal Procedure.

In the matter of Ponnusami ... 517

2. *s. 106—Appellate Court cannot bind over to keep peace when Lower Court not one of the class referred to in the section, and no breach of the peace committed:*

An accused person cannot be bound over to keep the peace under section 106 of the Code Criminal Procedure unless he is convicted of an offence of which a breach of the peace is a necessary ingredient and unless it is found that a breach of the peace has actually occurred. An Appellate Court cannot exercise the power under the section when the accused has not been convicted by a Court such as is referred to in the section.

Muthiah Chetti v. Emperor ... 190

3. *s. 145—Enquiry to be held before issuing preliminary order under—Jurisdiction of Magistrate—Failure of jurisdiction where Magistrate refuses to receive evidence which party is entitled to adduce under s. 145 (5):*

In order that a Magistrate may have jurisdiction to act under section 145 of the Code of Criminal Procedure, he must be satisfied from a Police report, or other information, that a dispute likely to cause a breach of the peace exists concerning any land, etc. Where there is no Police report the statement of interested parties ought to be received with great caution and ought not to be acted upon unless they are corroborated by the testimony of less interested persons. The opposite party also ought to be given an opportunity of cross-examining the party making such statements before the Magistrate takes any action on them. Under section 145 of the Code of Criminal Procedure, a party who is required by a preliminary order to attend at the Magistrate's Court is entitled to show that no dispute likely to cause a breach of the peace exists or had existed, and it is not open to such Magistrate to refuse to receive such evidence when tendered. Where the Magistrate refuses to receive such evidence, his order will be set aside as having been passed without jurisdiction. *Per DAVIES, J.—A Magistrate acts ultra vires* in clubbing together disputes relating to a large number of villages and treating them as one. Each village must stand on its own footing and the Magistrate should satisfy himself that a dispute existed in respect of all the villages. He should ascertain, as regards each village, which party was in possession at the date of the order and confirm that possession. The object of Chapter XIV of the Code of Criminal Procedure being to procure prompt action to avert breaches of the peace, the Legislature could not have contemplated under that chapter wholesale proceedings in regard to a large number of villages which, if the procedure above stated be adopted, would entail a prolonged enquiry.

Breeman Kumara Tirumalraja Bahadur, Rajah of Karvetnagar v. Sowcar Iodd Govind Doss Krishna Doss ... 561

4. *s. 147—Construction of the words "concerning any land"—Landlord and tenant—Right of tenant to enclose cultivable land by a wall:*

The enclosing by a tenant of cultivable lands by a wall instead of a hedge is not *prima facie* an interference with the landlord's rights and ought not to be interfered with under section 147 of the Code of Criminal Procedure by a Magistrate, being a matter to be settled by a Civil Court. In such cases, if a breach of the peace is apprehended, security must be taken from the party in possession. The words "concerning the use of land" in section 147 of the Code of Criminal Procedure cannot be qualified, and the section construed as if it contained words that the user to which the dispute relates is a user by a party other than the party in possession. *The Empress v. Ganapat Kalwar*, (4 C.W.N., 779), not followed. *Subba v. Trincal*, (I.L.R., 7 Mad., 461), referred to and followed.

Arunachellam Chettiar v. Chidambaram Chetti ... 97

5. *to use a mosque within the section—Charter Act, s. 15:* **s. 147—Dispute as to right**
 An order, under section 147 of the Code of Criminal Procedure, declaring possession to be with a certain person is illegal when there has been no enquiry as to the party in possession and will be set aside under section 15 of the Charter Act. A dispute as to the right to use a mosque between persons claiming to be entitled to officiate as Kazi therein is a dispute coming within section 147 of the Code of Criminal Procedure.
Kader Batcha v. Kader Batcha Rowthan ... 237
6. *may be made within a reasonable time after disposal of the main question:* **s. 148 (3)—Award of costs**
 An award of costs under section 148 (3) of the Code of Criminal Procedure should, in the usual course, be contemporaneous with the decision of the main question. Where, however, circumstances require the postponement of the award of costs, it should be made within a reasonable time after the disposal of the principal subject of the proceeding in the presence of both parties.
Pythianada Tambiran v. Mayandi Chetty ... 373
7. **s. 164:—See "PENAL CODE."**
8. *against order of District Court granting sanction—Power of High Court on such appeal:* **s. 195, cls. 6, 7—Appeal**
 An appeal lies to the High Court against an order of the District Judge granting sanction under clauses 6 and 7 of section 195 of the Code of Criminal Procedure. Where such order has revoked the sanction granted by the Munsif for prosecution under certain sections of the Indian Penal Code but granted sanction to prosecute under other sections, it is competent to the High Court on appeal, therefrom, not only to revoke the sanction granted but also to grant the sanction refused.
Kannamath Imbichi Nair v. Manathanath Ramar Nair ... 122
9. *only an irregularity and not fatal to the prosecution:* **ss. 195, 537—Sanction, want of,**
 The general provisions of section 195 of the Code of Criminal Procedure ought not to be so construed as to nullify the special provisions of section 537 (b). The want of sanction required by section 195 of the Code of Criminal Procedure is not fatal to a prosecution unless the accused is prejudiced thereby. *Raj Chunder Mozumdar v. Gour Chunder Mozumdar*, (I.L.R., 22 Cal., 176), dissented from.
Ismal Rowther v. Shunmagavelu Nadan ... 149
10. *under, no bar to Magistrate rehearing complaint:* **s. 203—Dismissal of complaint**
 On a reference by the Sessions Judge as to whether it was competent to a Magistrate, after dismissing a complaint under section 203 of the Code of Criminal Procedure, to rehear the complaint, when such order of dismissal had not been set aside by a higher Court:—*Held*, (SUBRAHMANYA AYYAR and DAVIES, JJ., dissenting) that the dismissal of a complaint under section 203 of the Code of Procedure does not operate as a bar to the rehearing of the complaint by the same Magistrate, even when such order of dismissal has not been set aside by a competent authority. *Mahomed Abdul Mennan v. Panduranga Row*, (I.L.R., 28 Mad., 256), dissented from. *Dwarika Nath Mondul v. Beni Madhab Banerjee*, (I.L.R., 28 Cal., 652), approved and followed. *Mir Ahwad Hossein v. Mahomed Askari*, (I.L.R., 29 Cal., 726), approved and followed. *Per Sir ARNOLD WHITE, C.J.*—The power to enquire into an offence must be held to exist in a Magistrate until something has occurred to divest the Magistrate of this jurisdiction. An order under section 203 of the Code of Criminal Procedure is not a judgment to which the provisions of section 369 will apply. The principle of *autrefois acquit* will not apply as there is no trial when the complaint is dismissed under section 203 of the Code of Criminal

Procedure. The provisions of sections 147, 400, 215 and 210 of the Code of Criminal Procedure of 1872 compared with the corresponding sections 203, 403, 253 and 242 of the present Code. The alterations in the present Code in regard to the sections under consideration were merely drafting alterations and were not intended to effect and did not effect any alteration in the law as laid down by the old Code. *Per BENSON, J.*—The decisions in *Queen-Empress v. Adam Khan* (I.L.R., 22 All., 106), *Nitraton Sen v. Jogesh Chundra Bhattacharjee*, (I.L.R., 23 Cal., 983), and *Mahomed Abdul Mennan v. Panduranga Row*, (I.L.R., 28 Mad., 255), do not apply, as in those cases it was not the same but a different Magistrate who proceeded to rehear the complaint. There is no bar under the Code to the complaint being reheard unless the proceedings have reached such a state of finality that an acquittal or an order operating as such under the Code is recorded. *Per MOORE, J.*—The maxim *nemo bis vexari* has no application to an order under section 203 of the Code of Criminal Procedure, though it may be a good argument, where an accused has been discharged under sections 253 and 259 of the Code. *Per SUBRAHMANYA AYYAR, J.*—Although the technical doctrine of *autrefois acquit* will apply only to acquittals, the principle underlying such doctrine, that a person should not, in respect of an offence, be in jeopardy of prosecution more than once, applies to cases where the prosecution failed to reach the stage of acquittal without any fault on the part of the accused, unless its application is precluded by the provisions of the Code. Acquittal in common law means an acquittal after verdict or sentence. The Legislature having by sections 333, 494 and 248 of the Code of Criminal Procedure given the term a wider significance, the explanation to section 403 was intended to guard against the term being applied to cases where the plea of *autrefois acquit* was not technically applicable and not to bar the application of the aforesaid analogous principle where justice required it. There being thus no legal provision to the contrary, an order dismissing a complaint or discharging the accused must, on the above principle, operate as a bar to further enquiry into the same matter as long as such order remains in force. Orders under sections 203, 253 and 259 of the Code of Criminal Procedure stand on the same footing as regards the application of this doctrine. There is no inherent power in a Magistrate to revise his own order of dismissal or discharge.

Emperor v. Chinna Kaliappa Gounden ... 126

11. **ss. 222, 234—Criminal**
breach of trust—Joinder in one trial of charges for two distinct items with another for a gross sum is not illegal—Construction of statute:

Under section 222 of the Code of Criminal Procedure a charge of criminal breach of trust in respect of a gross sum, without specifying the items, is a charge for one offence within the meaning of section 234. Section 222 of the Code of Criminal Procedure does not apply only to cases where there is a general deficiency and the prosecution is unable to specify the particular items of the deficiency, but also to cases where the items may be, but are not, specified. The joinder in one trial of charges of criminal breach of trust in respect of two distinct items with a charge in respect of a gross sum (the items constituting which may be but are not specified) is a joinder of only three charges, and is not bad as contravening the provisions of section 234 of the Code of Criminal Procedure. "The essence of a code is to be exhaustive on the matter in respect of which it declares the law and it is not the province of Judge to disregard or go outside the enactment according to its true construction." *Subramania Aiyar v. King-Emperor*, (I.L.R., 25 Mad., 61), distinguished.

Thomas v. Emperor ... 558

12. **ss. 227, 233, 234—Joinder**
of more than three offences in one trial illegal—Trial not validated by striking out charge to cure such defect after case closed, though before judgment—Penal Code—Act XLV of 1860, ss. 478, 480—Offence of using false trademark—No acquisition of the trademark in the sense used in the English Act necessary under s. 478 of the Indian Penal Code:

A person selling soap not manufactured by P, in a box which bears the name of P as a soap manufacturer, uses a false trademark and is guilty of an offence under section 480 of the Indian Penal Code. It is not

necessary to constitute an offence under section 473 that trademark in the sense in which the word is used in the English Patents, Designs and Trademarks Acts should have been acquired; and the mark is none the less a false mark because it appeared on the box and not on the goods. Under sections 233 and 234 of the Code of Criminal Procedure, a person cannot be charged with more than three offences at one trial; and the defect cannot be cured, after the accused had pleaded and the case had closed, by amending the charges so as to reduce it to three offences. Although the words in section 227 of the Code of Criminal Procedure are wide enough to warrant a Court in altering a charge by striking out one of the charges at any time before judgment, the section does not warrant the striking out of a charge for the purpose of curing an illegality already committed and after the mischief which the Legislature intended to guard against had been done. *Subrahmanya Aiyar v. King Emperor*, (I.L.R., 25 Mad., 61), referred to and explained.

Manavala Chetty v. Emperor 569

13., ss. 243, 252—Trial of a warrant case as a summons case not a mere irregularity:

Where a Magistrate in trying a warrant case does not adopt the course prescribed by section 252 of the Code of Criminal Procedure, but convicts the accused on his own admission without taking evidence and without framing a formal charge, such procedure is not a mere irregularity and the conviction will be set aside.

Emperor v. Chinnapayan 372

14., s. 307—Procedure of High Court on reference under—'Opinion' of jury, what is:

Where the Sessions Judge disagreeing with the jury, refers a case to the High Court under section 307 of the Code of Criminal Procedure, the High Court is to form its own opinion on the evidence. The 'opinion' of the jury in section 307 of the Code of Criminal Procedure is the conclusion of the jury, and not the reasons on which that conclusion is based. *Per Sir SUBRAHMANYA AYYAR*, Offg. C.J., and *BODDAM, J.*—In references under section 307 of the Code of Criminal Procedure, although it may be expedient to have before the Court the reasons of the jury for the view taken by them, when any have been given, the circumstance that no such reasons have been ascertained does not warrant this Court to decline to go into the evidence and to arrive at its own judgment, after giving due weight to the views taken by the Judge and the jury as to the guilt or innocence of the accused.

Emperor v. Chellan 91

15., s. 421—Summary rejection of appeal:

Where a petition of appeal signed by a pleader is presented to a Magistrate by the party in person, the appeal cannot be dismissed without giving the pleader a reasonable opportunity to appear. Where the conviction is based on the evidence of witnesses whose credibility is impeached by the accused on reasonable grounds, the appeal should not be summarily rejected under section 421 of the Code of Criminal Procedure without sending for the records.

Rangacharlu v. Emperor 236

16., s. 423—Order under VII of 1870: directing payment of costs not an enhancement of sentence—Court Fees Act

An order under section 31 of the Court Fees Act directing the accused, on appeal against conviction, to pay the costs of the complainant is not an enhancement of the sentence. *Madan Mandal v. Haran Ghose*, (I.L.R., 20 Cal., 687), approved. *Queen Empress v. Tangavelu Chetty*, (I.L.R., 22 Mad., 153), dissented from.

Emperor v. Karuppana Pillai 185

17., s. 476—Power to direct proceedings conferred on Court and not on Magistrate trying—Dismissal of complaint without adjudication no bar to proceedings under:

The power to direct a prosecution under section 476 of the Code of Criminal Procedure is conferred on the Court and not on the individual Magistrate who tried the case. Such power is not ousted by the dismissal, without adjudication of a complaint by the party in respect of the same offence under a sanction previously given by the Court.

Runga Ayyar v. Emperor 331

18., ss. 476, 435, 439—Power of High Court to interfere in proceeding under section 476—Madras Act III of 1869, scope of—Judicial Proceedings—Pleader, propriety of imputations made by:

The High Court has power to revise proceedings under section 476 of the Code of Criminal Procedure when such proceedings are null and void for want of jurisdiction. *Eranholi Athan v. King-Emperor*, (I.L.R., 26 Mad., 98), referred to and distinguished. Madras Act III of 1869 does not authorise the issuing of summons in a departmental inquiry for bribery. The pendency of an appeal by the accused, who had paid the fine imposed on him, would not give any Court authority or power to arrest him or to take recognisances from him for appearing at any further enquiry. The presenting of a petition imputing improper motives to a Magistrate who is illegally detaining a person to take recognisances from him to enforce his attendance for the foregoing purpose will not justify any action by such Magistrate under section 476 of the Code of Criminal Procedure as the offence is not committed in the course of a judicial proceeding, nor is it brought to his notice in the course of such proceeding.

Suryanarayana Row v. Emperor 100

19., ss. 517, 523—Sections not applicable where there was no trial and no evidence recorded:

When a person charged before the Magistrate with criminal breach of trust in respect of certain jewels died before trial and before any evidence was recorded and the alleged owner of the jewels, which were recovered by the Police from the pledgees and sent to the Magistrate along with the charge sheet, applied to be put in possession of them under sections 517 and 523 of the Code of Criminal Procedure after enquiry as to their ownership:—*Held*, that section 517 of the Code of Criminal Procedure did not apply to the case. *Held further*, that as there was no evidence or finding about ownership, section 523 of the Code of Criminal Procedure did not apply and that the Magistrate was not bound to hold an inquiry simply to determine the ownership of the jewels.

In the matter of Kuppanmal 375

20., s. 562—Power conferred by section not confined to Courts of First Instance:

The power of passing orders under section 562 of the Code of Criminal Procedure is not confined to Courts of First Instance. *Emperor v. Birch*, (I.L.R., 24 All., 306), approved.

Narayanawami Naidu v. Emperor 567

- DARKAST RULES—Nature of grant—Power of Civil Courts to interfere where grant set aside by appellate authority on the ground of irregularity of procedure:

A applied to the Tahsildar under rule IV of the Darkast rules for a grant of land. The Tahsildar made the grant under rule VII on the 10th May 1897 and the grant stated that it was subject to the result of any appeal that might be performed. On the 15th July 1897 and on the 2nd November 1897 two appeals were preferred to the Deputy Collector against the grant. On the 15th June 1898 the Deputy Collector issued a patta to A in pursuance of the grant. The appeals were heard on the 28th June 1898, after notice to A and the grant by the Tahsildar was set

aside on the ground that the notice under the rule V was not duly published. A appealed to the Collector and to the Board of Revenue and his appeals were dismissed. The present suit was instituted by A for a declaration that the lands had become his property and that the Deputy Collector's order cancelling the grant was null and void or in the alternative for a decree directing the defendant to pay the kist paid by A and the cost of the improvements effected by him. The Court of First Instance granted the declaration prayed for. On appeal the Subordinate Judge, holding that it was not open to the Civil Courts to question the propriety of the cancellation by the Deputy Collector, modified the decree by granting the alternative relief claimed in respect of kist and improvements. On appeal to the High Court, held:—*Per Sir ARNOLD WHITE, C.J.*—It is not open to a Civil Court to cancel a patta because some of the formalities of the Darkhast rules have not been observed. It may however set aside an order of an Appellate Revenue Tribunal which allows an appeal against a grant by a Revenue officer on the ground of irregularity of procedure if it is of opinion that there is no evidence of irregularity, although it will not be open to the Civil Court to interfere if the Tahsildar declined to make the grant on the ground of irregularity of procedure. In the former case, there is a conditional contract but in the latter there is no contract at all. *Per BENSON, J.*—Under the rules the Tahsildar has power only to make a conditional grant and the issue of a patta does not alter the conditional nature of the grant. A patta is in the nature of a mere bill and is not a grant or conveyance. It is not open to the Civil Courts to discuss the sufficiency or otherwise of the grounds on which the Darkhast authorities whether original or appellate grant or refuse to grant, Government lands to parties applying for them, so long as those authorities act within the scope of the authority conferred on them by the rules. *The Secretary of State for India v. Kasturi Reddi*, (I.L.R., 26 Mad., 268), referred to and approved. *Sappani Asari v. The Collector of Coimbatore*, (I.L.R., 26 Mad., 742), referred to and approved.

Muthu Veera Vandayan v. The Secretary of State for India in Council ... 461

DECLARATORY DECREE—Not to be given when suit is for cancellation and when no consequential relief prayed:

A suit for cancellation of a mortgage deed on the ground of fraud must be dismissed in the absence of evidence of fraud and a decree declaring plaintiff's right to a smaller amount cannot be made when at the date of the plaint the plaintiff was entitled to consequential relief which he failed to claim.

Chakka Subbiah v. Madduli Lakshminarayana ... 298

DISTRICT MUNICIPALITIES ACT (MADRAS)—ACT IV OF 1884, ss. 4-B (1) (b), 4-B (3) (b), 21, 261—Supersession of a municipal body under s. 4-B (1) (b) only a suspension—No notice under s. 261 required when the suit is only for injunction—Easements Act V of 1882, s. 7, ill. (a) and (i)—Right of proprietor on higher level under s. 7, ill. (i), not an easement and does not interfere with the right of lower proprietor to build on his own land under s. 7, ill. (a):

The 'supersession' of a Municipal Council under section 4-B (1) (b) of Madras Act IV of 1884 is only a suspension of such body for a limited period and such supersession is different from and has not the effect of a dissolution under section 4-B (1) (a). The 'reconstitution' of such a Council under section 4-B (3) (b) is the revival of the old corporation and not the creation of a fresh one and all the rights and liabilities of the superseded Council will devolve on the Council so reconstituted as its rightful successor. The notice required by section 261 of the District Municipalities Act is not necessary when the suit is for an injunction. The right of the owner of higher land under section 7, illustration (i), of the Easements Act, i.e., that the water naturally rising in, or falling on, such land, shall be allowed by the owner of adjacent lower land to run naturally thereto is not a right in the nature of an easement and is subject to the right of the owner of such lower land to build thereon under

section 7, illustration (a), of the Act. The owner of the lower land cannot complain of the passage of such water as an injury, but he is not bound to keep open such way and may obstruct it by suitable erections on his land. *Smith v. Kenrick*, (7 C.B., 515), referred to. *Rylands v. Fletcher*, (L.R., 3 H.L., 338), referred to.

Mahamahopadhyaya Rangachariar v. The Municipal Council of Kumbakonam ... 539

2. _____, s. 45—Contract not signed in accordance with section unenforceable:

A contract purporting to be made by a Municipality but not signed by the Chairman or Vice-Chairman and a Councillor as required by section 45 of Act IV of 1884 is not binding on the Municipality. *Radha Krishna Das v. The Municipal Board of Benares*, (I.L.R., 27 All., 582), followed. Where the contract is not so signed, the Municipality cannot be rendered liable on the ground of executed consideration. *Young & Co. v. The Mayor and Corporation of Royal Leamington Spa*, (L.R., 8 A.C., 517), followed.

Ramaswamy Chetty v. The Municipal Council, Tanjore ... 360

3. _____, s. 55—'Day,' what is—Circumstances which determine whether particular days are to be reckoned or omitted:

The word 'day' in section 55 of the Madras District Municipalities Act means a duration of 24 hours and the period of 60 days for which the person must have 'held office within the limits' must be held to be 60 entire and unbroken periods, in law, of 24 hours each. It will depend upon the circumstances whether fractions of a day are to be omitted or to be counted as whole days and the cause and character and duration of absence from Municipal limits will determine whether particular days are to be reckoned or omitted.

The Municipal Council of Cuddalore v. Subrahmania Ayyar ... 326

4. _____, ss. 197, 191—Market, definition of—Use of, as market, what amounts to:

Private property is used as a market when it is used as a public place for buying and selling. Where a private market had been ordered to be closed, a person using the place for selling fish and flesh after a license had been refused is guilty of an offence under section 197 of the Madras District Municipalities Act, or, at any rate, of an offence under section 191.

Abu Baker v. The Municipality of Negapattam ... 185

EASEMENTS ACT V OF 1882, s. 7, Ills. (a) and (i)—Right of proprietor on higher level under s. 7, ill. (i), not an easement and does not interfere with the right of lower proprietor to build on his own land under s. 7, ill. (a)—District Municipalities Act (Madras)—Act IV of 1884, ss. 4-B (1) (b), 4-B (3) (b), 21, 261—Supersession of a municipal body under s. 4-B (1) (b) only a suspension—No notice under s. 261 required when the suit is only for injunction:

The 'supersession' of a Municipal Council under section 4-B (1) (b) of Madras Act IV of 1884 is only a suspension of such body for a limited period and such supersession is different from and has not the effect of a dissolution under section 4-B (1) (a). The 'reconstitution' of such a Council under section 4-B (3) (b) is the revival of the old corporation and not the creation of a fresh one, and all the rights and liabilities of the superseded Council will devolve on the Council so reconstituted as its rightful successor. The notice required by section 261 of the District Municipalities Act is not necessary when the suit is for an injunction. The right of the owner of higher land under section 7, illustration (i), of the Easements Act, i.e., that the water naturally rising in, or falling on, such land, shall be allowed by the owner of adjacent lower land to run naturally thereto is not a right in the nature of an easement and is subject to the right of the owner of such lower land to build thereon under section 7, illustration (a), of the Act. The owner of the lower land cannot complain

of the passage of such water as an injury, but he is not bound to keep open such way and may obstruct it by suitable erections on his land. *Smith v. Kenrick*, (7 C.B., 515), referred to. *Rylands v. Fletcher*, (L.R., 3 H.L., 338), referred to.

Mahamahopadaya Rangachariar v. The Municipal Council of Kumbakonam

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FRAUD—Judgment obtained by perjury may be set aside on the ground of fraud:

A suit will lie to set aside a judgment on the ground that it was obtained by fraud committed by the defendant upon the Court by committing deliberate perjury and by suppressing evidence. The law on this point is the same in India as in England.

Venkatappa Naick v. Subba Naick

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GRANT, CONSTRUCTION OF—Mention of a person as heir of grantee confers no interest on such person:

Where a deed of grant to a widow recites that she has no other heirs than her daughter, and that the lands shall belong to such daughter at her death, the grant is not to be construed as a grant to the widow and her daughter. The grant is absolute and to the widow alone, the daughter taking no interest under it.

Rangasamy Naiken v. Gangammal

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GIFT:—See "HINDU LAW."

HINDU LAW—Acquisitions out of salary, *prima facie* separate property—Succession Certificate Act VII of 1889, s. 19—Discretion of Court in granting certificate:

Money connected with insurance, the premia for which are paid out of the salary of a deceased Hindu, is *prima facie* his separate property. *Mahadeva Pandia v. Rama Narayana Pandia*, (13 M.L.J., 75), followed. Where an application for a succession certificate under Act VII of 1889 by the widow of the deceased in respect of such money is opposed by his brother on the sole ground that the deceased was educated at the family expense, the certificate ought to issue in favour of the widow.

Rajamma v. Ramakrishnaaya

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2. **Adoption**—Authority of husband to his wife to adopt—Death of first adopted son—Second adoption, validity of—Consent of sapindas to adoption—Intention of husband as expressed in authority to adopt:

A husband verbally authorized his wife to adopt a son. The authority was in general terms requiring her to adopt so as to continue his line and to provide for his spiritual benefit; no particular person being indicated for adoption and no restriction placed on his wife's discretion. He died in 1861 and after his death the widow in 1885 adopted a son who died shortly afterwards. In 1898 she adopted another son with the consent of some of the sapindas:—*Held*, that the second adoption was valid, the authority to adopt not being exhausted by the first adoption. *Gournath Chowdhree v. Annoporna Chowdhrahi*, (1852), 8 S.D.A. (Peng.), 332, dissented from. *Ram Soondur Singh v. Surbanee Dossee*, (22 W.R., 121), approved. In such a case the intention of the husband is to be mainly considered. Any special instructions which he may give for the guidance of his widow must be strictly followed: where no such instructions have been given, but a general intention has been expressed to be represented by a son, effect should, if possible, be given to that intention.

Suryanarayana v. Venkataraman

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3. **Adoption**—Receipt of consideration by natural father for giving in adoption does not make the adoption invalid:

Where a boy, being a fit subject for adoption in the Dattaha form, is given and accepted, with the proper ceremonies for such adoption, by persons respectively competent to give and accept him, he acquires the status of an

adopted son. The receipt of money by the natural father in consideration of giving his son and the payment of such by the adoptive father, though illegal and opposed to public policy, do not make the adoption invalid, as the gift and acceptance of the boy is a distinct transaction clearly separable from the illegal agreement and payment. Such payment has not the effect of converting the adoption into an 'affiliation by sale,' a form now obsolete. *Manjaneer puthiran* is synonymous with Dattaha son. *Bhasba Rabidat Singh v. Indar Kumwar*, (I.L.R., 16 Calc., 556), followed.

Murugappa Chetti v. Nagappa Chetti

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4. **Character of decedibility not affected by forfeiture and regrant to heirs**—Adoption—Authority given jointly to two widows to adopt valid and can be exercised by one after the death of the other—Adoption made under coercion only voidable—Adoption does not divest adopted son of joint property of which he had become sole and absolute owner:

The question whether an estate is subject to the ordinary Hindu Law of succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it. *Srimantu Raja Yarlagadda Mallikarjuna v. Srimantu Raja Yarlagadda Durga*, (L.R., 17 L.A., 134 at p. 144), referred to and followed. Where an estate acquired by sale or forfeiture by Government is regranted to the heirs of the former owner without expressing any intention to interfere with the quality of the estate in regard to its decedibility, such regrant does not affect that quality of the estate, although it would be self-acquired property in the hands of the grantee and would devolve as such:—*Held*, on the evidence and the previous history of the Nidadavole estate that such estate was partible according to the ordinary Hindu Law applicable to co-parcenary property. An authority to adopt given to two widows jointly is not invalid and may be exercised by one after the death of the other. An adoption made under coercion is not void but voidable and will be valid if ratified subsequently if no one's interest is prejudicially affected by such ratification before it is made. The adoption into another family of the only surviving member of a joint family in whom the family estate has vested solely and absolutely does not, in law, operate to divest him of his rights in such estate.

Sri Raja Venkata Narasimha Appa Row v. Sri Raja Rangayya Appa Row and others

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5. **Charitable trusts, when colorable**—Limitation Act XV of 1877, art. 91—*Laches, undue influence, deed executed under*—Fiduciary relation, *deed between persons standing in*—Letters Patent, cl. 36:

A deed of trust can be held to be nominal only, when no charity or trust is brought into existence, when there is no proof of the application of the alleged endowments for the maintenance thereof, and the whole conduct of the parties is inconsistent with the hypothesis of a genuine trust. *Per* Sir S. SUBRAHMANYA AYYAR, Offg. C.J.—The provisions in a trust deed denying to the public any interest in the charities and authorising the change of the trust property are not inconsistent with the creation of a valid trust; and even if they were, they would be only invalid conditions annexed a valid trust. The doctrine that Courts will regard with jealousy transactions between persons standing in the fiduciary relation of parent and child will not apply when no advantage is secured to the former at the expense of the latter, and where the properties are already impressed with the trust, the appointment of the father as sole trustee is no such advantage as such a right exists under the Hindu Law. *Purappavanalangam Chetti v. Nullasivan Chetti* (1 M.H.O.R., 415). A party who has not sued within the period prescribed by article 91, schedule II of the Limitation Act to set aside an instrument on the ground of undue influence cannot be heard in derogation of the rights created by it. *Kanki Kunwar v. Ajit Singh*, (I.L.R., 15 Calc., 58), followed. One of two executants of a deed cannot, after the death of the other, set up the undue influence exercised by that other to defeat the rights of beneficiaries under the deed, when he had ample opportunities to do so in the lifetime of the other, and, when if he had done so, the other party would have had legal

power to carry out his intentions in favour of the beneficiaries by other means. *Per SANKARAN NAIR, J.*—The provision that the public shall have no interest in the trust converts it into a private trust, if any trust is created, which can be put an end to at any time; and the right to change the properties and to exclude or withdraw them as conferred by the deed implies a power not to create a trust so far as any or all of such properties are concerned. The above are not simply invalid provisions annexed to a valid trust, but rather negative the creation of any valid irrevocable trust at all. Where the author of an alleged trust intended to create a trust only enforceable after his death, reserving power to himself to dispose of the properties, such trust cannot, after his death, be enforced at the instance of a volunteer even so far as the properties as he may not have disposed of are concerned. A trust will be void if the subject of it is uncertain, as when it is to attach to such properties as the author should not dispose of during his life. The doctrine applied by Courts of Equity in regard to transactions between persons standing in the fiduciary relation of father and child will apply even when the father takes only as trustee. The ground of interference in such cases is not any benefit derived by the father, but the presumption that the son was not a free agent. The rule will apply when the person claiming is a volunteer with notice of the confidential relation; and the burden will be on such person to show that the son understood the terms and did form an independent opinion on the matter. Recitals in the deed calculated to produce irresistible moral pressure, as the alleged wishes of ancestors, etc., will be evidence of an improper exercise of parental influence, when such recitals are not true. *By Court.*—Section 575 of the Code of Civil Procedure does not apply in the case of appeals under clause 15 of the Letters Patent from judgments of the High Court in the exercise of its Original Jurisdiction. Under clause 36 of the Letters Patent where the Judges are equally divided in opinion, the judgment of the Senior Judge will prevail.

Roop Lal v. Lakshmi Doss 1

6. ———— *Endowment—Hereditary managers or trustees—Right of management vested by descent in two branches of a family—Relinquishment of right by junior branch to member of senior branch—Alteration thereby of turns of management—Continuous usage by senior branch—Delegation of duties of trustees:*

On the death of the sole manager of a Hindu temple and endowed property attached to it, the managership of which was hereditary in his family without any beneficial interest in the endowed property or income, the office devolved on his male descendants by his two wives, there being four in each branch. Until 1881–82 one member of each branch took the management for one year in alternate succession. In 1882 the members of the junior branch relinquished their rights in the management in favour of the plaintiff who was member of the senior branch and for 19 years immediately before suit there had been a settled order of succession amongst the members of the senior branch, the plaintiff in each period of eight years taking five turns (one in his own right and four in the turns of each member of the junior branch), and the other members of the senior branch (of whom the defendant was one) taking one turn each. On the expiration of one of the defendants' turns of management on 13th July 1899 he made over the temple to the plaintiff but retained the endowed property. In a suit brought on 3rd September 1900 to recover possession of it:—*Held*, by the Judicial Committee (upholding the decision of the Courts in India) that the unbroken usage during the time the order of succession had continued was conclusive evidence against the defendant of a family arrangement to which the Court was bound to give effect until it was validly altered, or superseded by a new scheme effected with the concurrence of all parties interested. It was one which those parties were competent to make without applying to the Court; and it was not for the defendant at his will and pleasure to disturb an arrangement of which he had on more than one occasion taken the benefit: nor could he in this suit set up the rights of the junior branch against the plaintiff. The manager of the temple was by virtue of his office the administrator of the property attached to it as regards which he was in

the position of a trustee. As regards the service of the temple and the duties appertaining to it he was in the position of the holder of an office or dignity which may have been originally conferred on a single individual, but, which in course of time had become vested by descent in more than one person. In such a case in order to avoid confusion it was not unusual, and certainly not improper, for the interested parties to arrange amongst themselves for the due execution of the functions belonging to the office, in turns, or in some settled order and sequence. There was no breach of trust in such an arrangement nor any improper delegation of the duties of a trustee.

Ramanathan Chetti v. Murugappa Chetti 283

7. ———— *Gift—Settlement on persons then in existence at close of a life in being valid—Trusts Act II of 1882, s. 6—Transfer of Property Act IV of 1882, ss. 14, 15 and 123—Trust validly created by registered instrument without delivery of possession—Sections 14 and 15 of the Transfer of Property Act do not affect any rule of Hindu Law:*

R. by a registered deed of settlement settled property in trust and after making various provisions for the maintenance of himself and his wife and his grand-daughters V. and R., further provided that, on the death of the survivor of the grand-daughters, the trustees were to hold the property in trust for the sons of the grand-daughters who attain 18 and the daughters of the grand-daughters who should attain that age or marry. A female child on the consummation of marriage or on attaining 18 was to be given Rs. 1,000, and a male child on attaining age was to be given his share of the property. The settler did not give possession of the properties to his trustees but remained in possession till his death. In a suit by the reversioners of R. to set aside the settlement as null and void:—*Held*, that a transfer of property and a valid declaration of trust were effected by the registered deed though unaccompanied by physical delivery of possession and that nothing in section 6 of the Trusts Act was in conflict with this view. *Held also*, that the settlement by way of remainder in favour of the sons of V. & R. (such sons being in existence at the date of the settlement) was valid under the Hindu Law. A settlement by way of remainder to take effect on the happening of an event following immediately on the close of a life in being is good. *Srinuthy & Co. v. money Dossu v. Denobundoo Mulluk*, (9 M.L.A., 134), followed. A bequest to a class, some of whom could not take, is not void but will enure for the benefit of such of the class who can take. The rule in *Leake v. Robinson*, (2 Mer., 363), does not apply to the wills of Hindus. *Bhagabati Barmanya v. Koli Charan Singh*, (I.L.R., 32 Cal., 992), referred to and followed. *Ram Lal Set v. Kanai Lal Set*, (I.L.R., 12 Cal., 663), referred to and followed. Sections 14 and 15 of the Transfer of Property Act do not affect the rule of Hindu Law above stated and do not apply to Hindu wills. In determining the validity or otherwise of dispositions of property under sections 14 and 15 of the Transfer of Property Act regard must be had to possible events and not to events as they have actually happened; and if it is possible that the vesting may be postponed beyond the limits fixed by the sections, the disposition will be bad although, as events actually happened, it was not so postponed.

Ranganatha Mudaliar v. Baghirathi Ammal 412

8. ———— *Impartible property—Liability of, for debts in the hands of successor—Impartible property which is not self-acquired is not assets for debts of previous holder:*

Debts contracted by the holder of an impartible estate which is not such holder's self-acquired property, are not binding on his successor who takes by survivorship, when they are contracted for purposes which will not be binding on him if the property was ordinary partible property; and such property is not assets in the hands of the successor for the payment of such debts, because he could not have questioned any alienation of the same by his predecessor. *Per SANKARAN NAIR, J.*—An undivided member who succeeds to ancestral impartible property to the exclusion of nearer heirs of the last holder, does so only by right of survivorship.

Katama Nachiar v. The Raja of Sivaganga, (9 M.I.A., 539, at pp. 611, 614); and not simply as a member of the family of which he and the last holder were undivided members. When the acquisition or recognition of ownership is due to a process of evolution or to judicial decisions extending over a comparatively long period of time, such ownership may carry with it certain incidents appropriate to it in its earlier stages but from which rights of ownership acquired in well-known and recognized modes are free. The decisions which, by negating co-parcenary rights in impartible estates and the power of questioning alienations incidental thereto, have recognised ownership in the holders of such estates do not therefore render it necessary to disregard the course of decisions in the Presidency and hold that such estate in the hands of the successor must be treated as assets for the payment of debts contracted by his predecessor.

Nachiappa Chettiar v. Chinnayasami Naicker ... 453

9. ———— *Liability of son for father's debt—Sale or mortgage by father binding only when there is a debt existing prior to the sale or mortgage:*

A sale or mortgage of joint family property by a father is binding on the son's share only when there is an antecedent debt, i.e., a debt existing prior to and independently of the sale or mortgage. Where the debt is incurred at the time of sale or mortgage, it is not an antecedent debt within the meaning of those words as used in the judgment of the Privy Council in *Suraj Bansi Koer v. Sheo Persad*, (I.L.R., 5 Cal., 148); *Chidambara Mudaliar v. Koothaperumal*, (I.L.R., 27 Mad., 326), dissented from; *Sami Ayyangar v. Ponnammal*, (I.L.R., 21 Mad., 28), approved.

Venkataramanaya Pantulu v. Venkataramana Doss Pantulu ... 200

10. ———— *Marmakatayam Law—Division amongst joint owners, when binding on minors—Arrangement not binding to which all members are not parties:*

Joint owners governed by the Marmakatayam Law can allow one or more of themselves to take any portion of the joint property as his or their separate property. Such transaction requires the consent of every one interested in the property; and where there are minors incapable of consenting, the transaction to be binding on the Tavazhi must be for consideration and beneficial to the family as a whole.

Arayalprath Kunhi Pocker v. Kanthilath Ahmad Kuti Haji ... 62

11. ———— *Mitakshara—Stridhanam, devolution of—Sister takes precedence over sister's son—Nature of right:*

Under the Mitakshara Law, where a woman not married in any of the approved forms dies issueless, her stridhanam property, in the absence of nearer heirs, passes to the sister in preference to the sister's son. The Mitakshara is the paramount authority in this Presidency and in the absence of a consensus of opinion among the commentators, and where there is no evidence of usage to the contrary, the general doctrine of Mitakshara Law must prevail over the Smriti Chandrika. A woman taking stridhanam property of a deceased female by inheritance will take only a limited interest in such property. *Muthappudayan v. Annmani Ammal*, (I.L.R., 21 Mad., 58 at p. 62), referred to. *Salemma v. Latchmana Reddi*, (I.L.R., 21 Mad., 100 at pp. 103 and 104), referred to.

Raju Gramany v. Annmani Ammal ... 358

12. ———— *Poliems—Impartible estate in the hands of a son, assets for payment of father's debts—Sale of right, title and interest which defendant alone possesses, effect of:*

Impartible estate taken by a son by heritage from his father is assets for the payment of the father's debts not contracted for immoral or illegal purposes, and may be attached and sold in execution of a decree for such debts. *Muttayan Chettiar v. Sangili Vira Pandia Chinnatambiar*, (L.R., 9 I.A., 128), referred to. Where, subsequent to the passing of Act X of 1877, in execution of a decree against the owner of an impartible estate, such estate is brought to sale and the proclamation of sale describes the property sold as 'the right, title and interest of the defendant

alone' in accordance with the form in force prior to the passing of Act X of 1877, the mere use of such words, which were omitted in the Act of 1877, does not necessarily imply that the interest sold is less than the full proprietary interest. That the law as then established by judicial decisions recognised only a limited interest in the owner, does not of necessity raise the implication in such cases. The nature of the debt and other circumstances may show that the full interest including that of the sons was actually brought to sale and purchased. *Abdul Aziz Khan v. Appayasami Naicker*, (I.L.R., 27 Mad., 131), distinguished.

Veera Soorappa Nayani v. Errappa Naidu ... 484

13. ———— *Religious endowment—Decree against head of mutt binds successor in execution proceedings—Decree on promissory note executed by head of mutt binds the mutt—Compromise decree, effect of—Parties to suits—Sishyas cannot be made parties:*

A decree passed against the head of a mutt as representing the mutt is binding on his successor who cannot dispute the validity of the decree in execution proceedings but can do so only by a properly framed suit. *Sudindra v. Rudan*, (I.L.R., 9 Mad., 80), referred to and followed. The head of the mutt represents the mutt even when the suit is brought on a promissory note executed by him and he cannot therefore question the validity of the transaction. The binding nature of the decree in such cases is not affected by the fact that it is based on a compromise. The sishyas or disciples of a mutt are not co-owners with the head of the mutt and have no such interest in the mutt property as will entitle them to be made parties in a suit to recover property from the head of the mutt.

Manikka Vasaka Desikar alias Gnana Sambanda Pandara Sannadhi v. Balagopalakrishna Chetty ... 553

14. ———— *Reversionary right, nature of—Transfer of Property Act IV of 1882, s. 6:*

The right of a presumptive reversionary heir under Hindu Law is no more than a *spes successionis* or expectancy of succeeding to the property. Such expectancy cannot be transferred under section 6 of the Transfer of Property Act.

Manickam Pillai v. Ramalinga Pillai ... 120

15. ———— *Reversioner, suit by to set aside adoption—Reversioner in such suit represents all interested in the reversion, but does not in suits questioning alienations—Alienation by limited owner gives rise to only one cause of action:*

Although in suits relating to alienations by a qualified owner, the presumptive reversioner cannot, on the current of authority, be held to represent remote reversioners, yet in suits to set aside an adoption, the presumptive reversioner ought on principle to be held to represent the remote reversioner, provided the matter is decided after a fair trial; and this principle will apply equally when a remote reversioner is allowed to sue under special circumstances to set aside an adoption. An unauthorised alienation by a qualified owner gives rise to a cause of action for a declaratory suit from the date of alienation, to all reversioners. In such cases there is only one cause of action to be sued upon. The true purpose of the concession of a right of suit in these cases is the protection of the interest of the person or persons who may eventually turn out to be the heir or heirs, and the object of the legal proceeding is really the perpetuation of testimony which, owing to lapse of time, might not be available for the heir when the succession actually opens. The reversioner actually suing does not only do so for himself but also on behalf of all the rest. *Rani Anund Koer v. The Court of Wards*, (L.R., 8 I.A., 14 at p. 22), referred to. *Brojo Kishore v. Sreenath Bose*, (9 W.R., 463 at p. 465), referred to. Suits involving questions as to adoptions stand on quite different grounds from those impeaching the validity of alienations. The grave and important nature of disputes relating to adoptions, makes it desirable that the adjudication in such cases should be made final as far as

possible. Where the presumptive reversioner or with the permission of the Court, a more remote reversioner brings such a suit, the Court ought to require him to disclose the names of other persons interested in the reversion and direct notices to be served on them, to enable them to be made parties should they so desire. *Ayyadorai Pillai v. Solai Ammal*, (I.L.R., 24 Mad., 405), approved. *Adilakshmi v. Venkataramayya*, (13 M.L.J., 359), not followed.

Chiruvolu Punnamma v. Chiruvolu Perrazu 390

16. ———— *Succession—Bandhus—Father's sister's daughter's son entitled in preference to paternal grandfather's sister's son :*

It is a cardinal principle of Hindu Law that the nearer line excludes the more remote and the ground of distinction in favour of a party who is able to trace his descent with less intervention of females will not apply where he competes with one of a nearer line. The father's sister's daughter's son, being an *atmabandhu*, is entitled to succeed in preference to the paternal grandfather's sister's son—a *pitirbandhu*. *Balusami Pandithar v. Narayana Rao*, (I.L.R., 20 Mad., 342), referred to.

Krishna Ayyangar v. Venkatarama Ayyangar 115

INDIAN COMPANIES ACT VI OF 1882, s. 4—What is 'association' within the meaning of—Legal relation creating joint or mutual rights necessary—*Chitfund* :

"To constitute an 'association' within the meaning of section 4 of the Indian Companies Act, the existence of a legal relation between more than twenty persons giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary." *Panchena Manchu Nayar v. Gadinhare Kumaranachath Padmanabhan Nayar*, (I.L.R., 20 Mad., 68 at p. 73), referred to and approved. Where more than twenty persons enter into an agreement by which a *chitfund* is created and it is clear from the agreement that the only proprietors of the fund are the two organisers and the other persons have entered into no contract with each other, the parties to such agreement do not form an association of which registration is necessary under section 4 of the Indian Companies Act.

Neelamega Sastri v. Appiah Sastri 477

INJUNCTION MANDATORY—Discretion of Court—Landlord cannot have mandatory injunction in respect of building, if knowing of the obstruction he does not object :

Where the tenant of an agricultural holding, constructs a building of a character not suitable to such holding, with the knowledge of the landlord, such landlord is bound not only to object but to take legal steps to stop the progress of the work; and, in default of doing so, the landlord is not entitled to a mandatory injunction for the demolition of the building. The same principle will apply where the party building is not the tenant but one who does so under agreement with the owner of the kudivaram right. *Benode Coomaree Dossee v. Sondaminey Dossee*, (I.L.R., 16 Calc., 252), followed. *Sankaralingam Chettiar v. Stephen Augustus Ralli*, (S.A. No. 959 of 1901) (unreported), followed.

Ulagappan Ambalam v. Chidambaram Chetty 497

JURISDICTION :—See "ARBITRATION."

2. ———— *Non-resident foreigner - Subjects of protected Native States may be sued if cause of action arises within the jurisdiction :*

A non-resident foreigner, who is a subject of a protected Native State, may be sued in the Courts of British India, if the cause of action arose within the jurisdiction of any such Court. Even apart from the provisions of section 17 of the Code of Civil Procedure, the cause of action in the case of contracts arises at the place of performance. *Annamalai Chetty v. Murugesu Chetty*, (I.L.R., 26 Mad., 514), followed.

Tadepalli Subba Rao v. Nawab Sayed Mir Gulam Ali Khan of Banganapalli ... 69

3. ———— *Subsequent extension of powers will not apply to a suit previously instituted :*

A suit rightly instituted as an original suit in a District Munsif's Court must remain for trial as an original suit in such Court and a District Court, by a subsequent extension of its powers as a Court of Small Causes, cannot acquire jurisdiction to try such a suit. *Hari Kamayya v. Hari Venkayya*, (I.L.R., 26 Mad., 212), followed.

Kannan Nambiar v. Anantan Nambiar 124

LAND ACQUISITION ACT I OF 1894—Parties bound by decision as to right to claim compensation in proceedings under—*Res judicata* :

An adjudication as to the right of persons claiming compensation under the Land Acquisition Act I of 1894 concludes the question between the same parties in subsequent proceedings. *Mahadevi v. Neelamani*, (I.L.R., 20 Mad., 269), distinguished.

Chowakaran Makki v. Vayyaprath Kunhi Kutti Ali 173

2. ————, s. 55—*Appeal against award—Hindu Law—Charity properties primâ facie inalienable :*

Properties set apart for charities are *primâ facie* inalienable; and where such properties are acquired under the Land Acquisition Act, the award made thereunder may direct the investment of the compensation money in Government securities. An appeal lies against the award in so far as it directs investment, under section 54 of the Land Acquisition Act.

Shiva Rao v. Nagappa 117

LETTERS PATENT, cl. 12—*Jurisdiction over foreigner present or absent when suit instituted—What amounts to dwelling within the jurisdiction—In administration suit undertaking to administer forms part of cause of action—Estoppel against executor taking probate and realising assets—Administration may be ordered of immoveable property outside jurisdiction :*

Suit on the Original Side of the High Court by three executors and trustees of the will of A against A's son, the fourth executor, and trustee, praying for his removal and for the administration of the estate by the Court. The executors had obtained probate of the will from the High Court limited to the assets in the Presidency, and the assets realized by virtue of this grant had come into the hands of the defendant who subsequently repudiated the will and claimed to take the estate of the deceased by survivorship. Some months before the institution of this suit the defendant who was domiciled in the Mysore State had left his house in Mysore in charge of a peon, and had brought his wife and child to Madras and taken a house there, and apprenticed himself for one year to a Vakil of the High Court with a view to becoming enrolled as a Vakil. He was present in Madras on 30th of August 1901, when the plaint was filed, but left on the following day before the summons was served. Moore, J., directed the defendant to be removed and passed a preliminary order for the general administration of the estate :—*Held*, on appeal, that the High Court had jurisdiction under clause 12 of the Letters Patent to try the suit. *Per* ARNOLD WHITE, C.J.—The jurisdiction conferred by clause 12 of the Letters Patent where the cause of action arises wholly, or in part, within Madras extends to suits against absent foreigners. Further, in this case, the presence of the defendant within the jurisdiction when the suit was instituted, that is, when the plaint was filed, would give jurisdiction. Observations as to the jurisdiction of the old Supreme Court now vested in the High Court. *Per* SUBRAHMANYA AYYAR, J.—The presence of the defendant in Madras when the suit was instituted by filing the plaint placed him in the position of an ordinary subject of His Majesty with regard to jurisdiction. Even if the defendant had been absent when the suit was instituted, there would be nothing contrary to international law in holding that the jurisdiction conferred by clause 12 when the cause of action arises wholly or in part with the jurisdiction applied to his case.

According to the general principles of English jurisprudence temporary presence and the accrual of the cause of action within the limits of the Court would each by itself be a ground of jurisdiction; and in this case the cause of action which accrued in Madras by its very nature made the defendant liable to the authority of the Court. *Annamalai Chetty v. Murugasa Chetty*, (I.L.R., 28 Mad., 544), *Girdhar Damodar v. Kassigar Biragar*, (I.L.R., 17 Bom., 662), *Gurdial Singh v. Rajah of Faridkote*, (L.R., 21 I.A., 171), and *Tadipalli Subba Row v. Nawab Sayed Mir Gulam Ali Khan*, (I.L.R., 29 Mad., 69), considered and explained. *Per curiam*.—In the circumstances set out above, the defendant was dwelling in Madras within the meaning of clause 12 of the Letters Patent (*Goswami Shri Ghordharaji v. Shri Govardhanlalji*, I.L.R., 18 Bom., 290, considered); further the undertaking to administer the estate given by the defendant at the time of the grant of probate was part of the cause of action arising within the jurisdiction within the meaning of the clause. The defendant having with full knowledge of his rights accepted the office of executor and taken probate of the will and under its authority collected assets and acted so as to cause third parties to alter their position was estopped from disputing the validity of the will on the dispositions and conditions contained therein. The preliminary order for the general administration of the estate of the deceased was not open to objection on the ground that part of the immoveable property of the deceased was situated in Mysore. In compelling the defendant to perform the trusts of the will the Court is acting *in personam*, and when so acting has the same jurisdiction with regard to any contract made or equitable between persons here as it has where the lands or assets are locally situate within the jurisdiction.

Srinivasa Moorthy v. Venkata Varada Ayyangur

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2. ———, cl. 36:—See "HINDU LAW."

LIMITATION ACT XV OF 1877, s. 19—Requisites of a valid acknowledgment—
Transfer of Property Act IV of 1882, s. 55 (5) (d)—Where no contract to the contrary, liability to pay public charges attaches to vendee on the passing of property—Condition precedent to liability:

Under section 55 (5) (d) of the Transfer of Property Act, the liability of the vendee to pay the public charges on the property sold attaches in the absence of a contract to the contrary, as an incident of the transfer and is complete when the property passes. Where the adjustment of matters, which form part, but are not the essence and substance of the contract, cannot be carried out in the mode contemplated, the Court will do whatever may be right and proper to effect such adjustment itself. *Dunham v. Brauford*, (L.R., 5 Ch., App. 519), referred to. Where a deed of sale provides that the vendee shall pay "the amount due, as per sub-division of the peshkush due to Government" and the deed contains no other words to show that the sub-division was a pre-requisite to the vendee's liability, the mere use of the words *as per sub-division* does not make it such and, where no sub-division is effected, and the vendor pays the whole peshkush, the Court will ascertain, as between the vendor and vendee, the proportion payable by the latter and direct payment thereof. An acknowledgment of a conditional liability will not, under section 19 of the Limitation Act, give a fresh start as long as the condition remains unfulfilled. There must be an unqualified admission or an admission qualified by a condition which is fulfilled.

Rajah Kavali Arunachella Row Bahadur v. Sri Rajah Rangiah Appa Row Bahadur

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2. ———, s. 20—Payment of interest as such—Payment must be of such a nature as to be a good defence to an action for the amount:

Where the payee of a promissory note was put in possession of certain lands under an agreement that he was to take the produce of the land as interest, such receipt of produce will be a payment of interest as such sufficient to satisfy the requirements of section 20 of the Limitation Act, as it will be a good defence to an action by the payee for the interest.

The payment contemplated by section 20 need not necessarily be in money but must be of such a nature as to be a good defence to an action for the amount due. *Kolipara Pullamma v. Maidula Tatayya*, (I.L.R., 14 Mad., 340), followed. *Kariyappa v. Rachapa*, (I.L.R., 24 Bom., 498), referred to.

Mylan v. Annavi Madan

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3. ———, sched. II, arts. 62, 97, 116—Transfer of Property Act IV of 1882, ss. 55 (2) and 108 (c)—Art. 116, sched. II of the Limitation Act will apply only when the transaction is one to which section 55 (2) or 108 (c) of the Transfer of Property Act will apply and a covenant for title or quiet enjoyment can be implied:

The first defendant, in September 1897 granted, in consideration of an advance, a registered karar to P, the predecessor in title of the present plaintiff, in the following terms: "Deed of consent or permission granted to . . . by . . . In consideration of this amount, the trees standing . . . shall be cut down at your expense during a period of 6 years from this date, with the exception of teak and blackwood. For every cart-load of timber so removed . . . you are to pay a kuttikanam of Rs. 2-4-0 and on those timber, the seal of the Etam shall be impressed without delay . . . During the period of 6 years, the Etam shall not grant any permission to others to cut trees . . . you have the right to cut down trees and none whatever to the land." The first defendant and the other defendants formed a Tarward, and in a suit brought on behalf of the Tarward against P and the first defendant, it was declared that the karar was not binding on the Tarward and P was restrained from cutting timber. The present suit was instituted by P to recover personally from the first defendant and from the Tarward properties the amount advanced with interest as damages:—Held, that the suit so far as the Tarward properties were concerned was *res judicata* by reason of the decision in the previous suit. Held also, that the suit as against the first defendant was barred by limitation. The article applicable to the suit is either article 62 or article 97 of schedule II of the Limitation Act. The document is not a sale or lease of immoveable property within the definition of those terms in the Transfer of Property Act and a covenant for title or for quiet enjoyment cannot be implied under section 55 (2) or section 108 (c) of the Act. Article 116 of schedule II of the Limitation Act does not apply to the case. The document did not create a mortgage or charge on immoveable property. It is no more than an exclusive license to cut trees. A document may create an interest in land and bring it within the provisions of the Registration Act. The covenant for title will not necessarily be implied in such cases, unless it is one of the transactions in which the covenant can be implied under the Transfer of Property Act. *Seeni Chettiar v. Santhanathan Chettiar*, (I.L.R., 20 Mad., 68), followed.

Mammikutti v. Pushakkal Edam

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4. ———, art. 91:—See "HINDU LAW."

5. ———, sched. II, art. 110—Rent in arrear from date on which it is due by contract or custom, when such rent ascertained and not in dispute:

Rent, when the amount is ascertained, is in arrear, within the meaning of article 110 of the schedule II of the Limitation Act from the date on which it is due by express contract or custom irrespective of the end of the fasli or of the exchange of patta and muchilika. Where the melawaram share due to the landlord is payable by custom as soon as the harvest is over, the rent is ascertained and payable at the end of the harvest and a suit for rent will be barred if not brought within three years of such date. *Rangayya Appa Rao v. Bobba Sriramulu*, (I.L.R., 27 Mad., 143), distinguished. Although tender of patta is a condition precedent to proceedings for the recovery of rent, there is nothing in the Rent Recovery Act or the Limitation Act to make the date of such tender the starting point of limitation in such cases.

Arunachellam Chettiar v. Kadir Rowthen

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6. ———, sched. II, arts. 132, 111—Article 132 applies to suits to enforce the charge created by s. 55 of the Transfer of Property Act—Transfer of Property Act IV of 1882, s. 55.
- The statutory charge which an unpaid vendor obtains under section 55 of the Transfer of Property Act is different in its origin and nature from the vendor's lien given by English Courts of Equity to an unpaid vendor. *Webb v. Macpherson*, (I.L.R., 31 Calc., 57), referred to and applied. The article of the Limitation Act applicable to a suit to enforce such charge is article 132 of schedule II and not article 111. *Natesan Chetti v. Soundararaja Ayyangar*, (I.L.R., 21 Mad., 141), overruled. *Avuthala v. Dayumma*, (I.L.R., 24 Mad., 233), overruled. *Subrahmanya Ayyar v. Poovam*, (I.L.R., 27 Mad., 28), overruled.
- Ramakrishna Ayyer v. Subrahmanya Ayyan* ... 305
7. ———, art. 134—Applies only when absolute property sold—Malabar Law—'Anubhavam' grants, meaning of—Whether the use of the word creates an irredeemable tenure depends on the particular instrument in each case.
- A stipulation in a kanom deed that a certain amount in grain or money is granted to the mortgagee as anubhavam does not necessarily create an irredeemable tenure. The word 'Anubhavam' will create an irredeemable tenure only when used with reference to the tenure itself but when used with reference to the allowance such allowance will be perpetual but not the tenure. Whether, in any particular case, the word creates an irredeemable tenure or only a perpetual rent charge in respect of the allowance must be decided on the language of the document. If the amount of the grant is not specified and if the terms of the document indicate that only a fixed rent is reserved for the grantor and the rest of the produce is given as 'Anubhavam,' an irredeemable tenure will be created but, otherwise, if the amount of the grant is fixed and the rest is reserved as rent. *Theyyan Nair v. The Zamorin of Calicut*, (I.L.R., 27 Mad., 202), referred to and distinguished. Article 134 of schedule II of the Limitation Act applies only to cases where the vendor purports to sell the property as his absolute property and the vendee purchases it as such. *Raddanath Doss v. Gisborne*, (14 M.I.A., 1 at p. 19), referred to and followed.
- Vythilingam Pillai v. Kuthiravattiah Nair* ... 501
8. ———, sched. II, arts. 175 (e), 178—Article 178 applies to applications to bring in representatives of deceased respondent in second appeals—Civil Procedure Code Act XIV of 1882, ss. 582, 587.
- The reference to section 582 of the Code of Civil Procedure in article 175 (e) of schedule II of the Limitation Act does not include by implication second appeals referred to in section 587 of the Code of Civil Procedure. The period of limitation for bringing in the representative of a deceased respondent in a second appeal is not that prescribed by article 175 (e) of schedule II of the Limitation Act, but that prescribed by article 178. *Lakshmi v. Sri Devi*, (I.L.R., 9 Mad., 1), followed. *Vakkalagadda Narasimham v. Vabhizulla Sahib*, (I.L.R., 28 Mad., 498) overruled.
- Susya Pillai v. Aiyakannu Pillai* ... 529
9. ———, art. 178—Application in time if within three years of breach complained of—Court executing decree, powers of—Cannot go behind decree—Civil Procedure Code—Act XIV of 1882, s. 260—Decree for perpetual injunction, execution of:
- Where a perpetual injunction has been granted, on each successive breach of it the decree may be enforced under section 260 of the Code of Civil Procedure by an application made within three years of such breach under article 178, schedule II, of the Limitation Act. The decree holder is not bound to take action in respect of every petty infringement; and the injunction does not by his inaction become inoperative after three years from the date of the first petty breach so as to disentitle him to take action where a serious breach is afterwards committed. Where the terms of a decree are clear, the executing Court is bound to give effect to

- it and cannot read into it limitations gathered from a reference to the records of the suit.
- Venkatachallam Chetty v. Veerappa Pillai* ... 314
10. ———, art. 179—Decree which leaves matters to be subsequently ascertained:
- A decree which leaves certain matters to be subsequently ascertained becomes capable of execution as to them only when they are ascertained; and an application for execution of such decree in regard to such matters will not be barred if presented within three years of the time when, by such matters being settled, it becomes executable.
- Ratnachalam Ayyar v. Venkatrama Ayyar* ... 46
- LIS PENDENS:—See "TRANSFER OF PROPERTY ACT, s. 52."
- LUNACY ACT—ACT XXXV OF 1858, ss. 3, 9, 10—Court bound to enquire into existence of property if denied:
- A petition under Act XXXV of 1858 to declare a person a lunatic and to appoint a proper manager and guardian, should not be dismissed without enquiry because the counter-petitioner denies the existence of any property belonging to the lunatic. The existence of such property is necessary as a pre-requisite to the Court taking action and must be ascertained by enquiry, where the existence of such is alleged by the petitioner and denied by the other party.
- Lakshmi Ammal v. Seerangathammal* ... 810
- MADRAS ACT III OF 1869, SCOPE OF:—See "CRIMINAL PROCEDURE CODE, ss. 476, 435, 439."
- MADRAS DISTRICT POLICE ACT XXIV OF 1859, s. 44—Police constable not returning to duty after expiry of leave guilty of offence under:
- A police constable, who, having obtained casual leave does not return to duty on the expiry of such leave and stays away without obtaining fresh leave, is guilty under section 44 of Act XXIV of 1859 of the offence of 'ceasing to perform the duties of his office without leave.'
- Emperor v. Ramasawmy Raju* ... 192
- MADRAS REGULATION VII OF 1817, s. 13—Board of Revenue may appoint hereditary trustees—Religious Endowment Act XX of 1863—Committee appointed under, cannot interfere with existing scheme except for just and sufficient cause—Act does not confer arbitrary power to appoint additional trustees:
- It is competent to the Board of Revenue under section 13 of Madras Regulation VII of 1817 to appoint hereditary trustees when such appointment does not interfere with any subsisting rights. Such appointment is not inconsistent with the exercise of superintendence by the Board, and the Board does not thereby relinquish a part of the duty of superintendence vested in them by section 2. *Venkatesa Nayudu v. Shrivani Shatagopa Shri Shatagopaswami*, (7 M.H.C.R., 77), approved. *Appasami v. Nagappa*, (I.L.R., 7 Mad., 499), referred to. The Board cannot arbitrarily put an end to an arrangement permanently made by them, but may do so only for just and sufficient reasons. It is not competent to a Temple Committee, under Act XX of 1863, to alter the constitution of the temple management established by the Board and to appoint additional trustees where some or all of the trustees are hereditary. Act XX of 1863 does not confer on the committee an unqualified power of adding to the number of trustees sanctioned under an existing scheme even if such trustees are not hereditary. Such an addition may be made only for just and sufficient cause which should be fully stated in the Proceedings of the Committee. The negligence or mismanagement of old trustees or any pecuniary benefit to the temple by the new appointments are not just and sufficient causes. Such appointments ought not to be temporary.
- Ganapathi Ayyar v. Sri Vedavyasa Alasinga Bhattar* ... 534

MADRAS SALT ACT IV OF 1889, ss. 16 (a), 18 and 27—No compensation under section 18 when license cancelled under section 27—Civil Procedure Code, Act XIV of 1882, s. 244 :

Where a license has been cancelled under section 27 of the Madras Salt Act IV of 1889, the licensee is not entitled to compensation under section 18 of the Act, but only to the value of the proprietary right under section 16 (a) of the Act. Where such licensee has obtained a decree for possession of salt pans in default of payment of proper compensation, it is competent to the Court in execution proceedings to determine the amount so payable; and no separate suit need be brought to determine such amount.

The Collector of Chingleput for the Secretary of State for India v. Subraya Mudaliar 81

MALABAR LAW—'Anubhavam' grants, meaning of—Whether the use of the word creates an irredeemable tenure depends on the particular instrument in each case—Limitation Act XV of 1877, art. 131—Applies only when absolute property sold :

A stipulation in a kanom deed that a certain amount in grain or money is granted to the mortgagee as anubhavam does not necessarily create an irredeemable tenure. The word 'Anubhavam' will create an irredeemable tenure only when used with reference to the tenure itself but when used with reference to the allowance such allowance will be perpetual but not the tenure. Whether, in any particular case, the word creates an irredeemable tenure or only a perpetual rent charge in respect of the allowance must be decided on the language of the document. If the amount of the grant is not specified and if the terms of the document indicate that only a fixed rent is reserved for the grantor and the rest of the produce is given as 'Anubhavam,' an irredeemable tenure will be created; but, otherwise, if the amount of the grant is fixed and the rest is reserved as rent. *Thayyan Nair v. The Zamorin of Calicut*, (I.L.R., 27 Mad., 202), referred to and distinguished. Article 134 of schedule II of the Limitation Act applies only to cases where the vendor purports to sell the property as his absolute property and the vendee purchases it as such. *Radanath Doss v. Gisborne*, (14 M.I.A., 1 at p. 19), referred to and followed.

Vythilingam Pillai v. Kuthiravathiah Nair 541

2. **Effect of gift of property to a female and her children—Such property not assets for the debts of a deceased member :**

A gift of property to a female and some or all of her children by their father or the Karnavan of the Tarward has not the effect of constituting them into a Tarward by themselves. They, however, hold the properties so given with the ordinary incidents of Tarward property and when a member dies, his interest passes by survivorship to the others and is not available for attachment at the instance of a decree-holder. *Kunhacha Umma v. Kutti Mammi Hafee*, (I.L.R., 16 Mad., 201), referred to.

Korath Amman Kutti v. Perungottai Appu Nambiar 322

3. **Karnavan right of, to sue a member in possession for maintenance :**

Where properties of a Tavazhi are in the possession of a member other than the Karnavan, the latter cannot sue such member for maintenance but only for possession of such properties.

Nambiamuttill Pokker v. Kithakki Kunhipatamma 206

MALICIOUS ARREST ACTION FOR—Not maintainable when arrest ordered by officer invested with discretionary power, before whom the full facts were placed by the defendant :

An action for malicious arrest is not sustainable, when the defendant has placed all the facts before the officer having the discretionary power to order such arrest and when such officer with full knowledge of all the facts exercised his discretion and ordered the arrest. In an action for false imprisonment the onus is on the defendant to plead and prove

affirmatively the existence of reasonable cause, whereas, in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non-existence. *Hicks v. Foulkner*, (51 L.J.Q.B., 268), referred to.

Thakdi Hajji v. Budrudin Saib 208

MARKET, DEFINITION OF:—See "DISTRICT MUNICIPALITIES ACT, ss. 197, 191."

MERCHANT SHIPPING ACT, 57 & 58 Vic., chap. 60, ss. 24, 57—No bill of sale necessary where vender sells only equitable interest :

The purchaser of an equitable interest in a ship can sue to establish his right to such interest and the income thereof without a registered bill of sale. Section 24 of the Merchant Shipping Act of 1894, which makes a bill of sale compulsory, does not apply to transfers of equitable interests which are governed by section 57 of the Act. *Ramanadhan Chetti v. Nagooda Maracayar*, (I.L.R., 21 Mad., 395), dissented from. *Chasteauneuf v. Capeyrow*, (L.R., 7 A.C., 127), followed.

Alagappa Chetty v. Chidambaram Chetty 526

MISJOINDER OF PARTIES AND CAUSES OF ACTION—No misjoinder where one relief merely ancillary—Landlord and tenant—Rights and liabilities of joint lessors and lessors who are tenants in common—Transfer of Property Act IV of 1882, ss. 37 and 109 :

A suit is bad for misjoinder where there is a joinder of two causes of action, in each of which, all the defendants are not interested. Where, however, there is really only one cause of action against some defendants, and the relief claimed against the other defendants is only ancillary to the relief to be given to the plaintiff in respect of such cause of action, the suit is not bad for misjoinder. *Saminada Pillai v. Subba Reddiar*, (I.L.R., 1 Mad., 333), distinguished. Per Sir S. SUBRAHMANYA AYYAR, Offg. C.J.—A tenant in common may have ejectment to the extent of his interest, on proper notice to quit; and the inclusion in such a suit of the other co-sharers, as defendants is merely the inclusion of persons properly parties to the proceeding and not of litigants against whom a separate claim, having no connection with the ejectment, is made. Per SANKARAN NAIR, J.—The distinction between the law in England and India as to the rights and liabilities of joint lessors and lessees discussed and explained; as also the rights of lessors who are tenants in common. Case law, English and Indian, on the subject, considered. Where the relation is created by contract with several joint landlords, according to the English cases, such relation subsists only so long as all of them wish it to continue, while according to the Indian cases it subsists until all of them agree to put an end to it; and such a contract cannot, in the absence of special circumstances, be put an end to by any one of them if they continue to hold as joint tenants. This principle, however, will not apply when the suit is for ejectment and partition and all the co-owners are made parties. The principles embodied in sections 37 and 109 of the Transfer of Property Act ought to be applied in such cases, though they are not expressly declared applicable. When the lessor recognizes the right of another in the premises demised, all the obligations of the lessee, as to payment of rent and surrender of possession, must, if such obligations be severable, and the lessee will not be prejudiced by such severance, be performed by the lessee between the lessor and such other, in such proportions as may be settled by all the parties concerned, including the lessee. If the matter has to be decided by suit, the lessor, lessee and such other person will be necessary parties.

Sri Raja Simhadri Appa Rao v. Pratiipatti Ramayya 29

MORTGAGE—Mortgage—Decree, rate of interest in—Contract rate not compulsory after date fixed for redemption :

In suits on mortgages, it is not compulsory on the Court to allow the contract rate of interest after the date fixed for redemption by the decree. *Commercial Bank of India v. Atsandrulayya*, (I.L.R., 23 Mad., 637), followed.

Saminathan Chettiar v. Swamiappa Naicker 170

MORTGAGE—Simple mortgage, personal liability under exists unless special contract to the contrary—Absence of specific prayer in plaint no ground for refusing appropriate relief—Delay no abandonment of right—Contract Act IX of 1872, s. 74, expt., effect of:

In the case of simple mortgages, the personal liability of the mortgagor exists, unless there is a specific contract to the contrary. *Wahid-un-Nissa v. Gobardham Das*, (I.L.R., 22 All., 453 at p. 461), referred to. Where the plaint asks for a decree against the defendants as members of the family and 'for such other relief as the Court may think fit,' the Court ought to grant the plaintiff such appropriate relief as he is entitled to and such relief cannot be refused on the ground that there is no specific prayer for such relief. Though it is within the scope of the authority of the managing member of a Hindu family to execute a mortgage so as to bind the family assets, the plaintiff in a suit on such mortgage is not entitled to a personal decree against a defendant member of the family who is not a party to the mortgage in respect of the money alleged to be in his hands. Mere delay by the plaintiff in suing to enforce a contract is no evidence of an intention not to enforce its terms. Under the explanation to section 74 of the Indian Contract Act, it is for the Court to decide on the facts of the particular case whether a stipulation for increased interest from the date of default is or is not a stipulation by way of penalty. It was not the intention of the Legislature to enact that such stipulations are always to be considered penal. The explanation was simply intended to meet the decisions in which it was held that such stipulations are not penal and must be enforced.

Abbakke Heggadhi v. Kinhiamma Shetty 491

2. ———— Whether sale followed by agreement to reconvey amounts to—Contract creating personal right not transferable:

Three brothers sold certain properties by a duly executed sale-deed. The vendee, more than two months after the sale, executed an agreement in favour of one of them in the following terms:—"You shall, on 29th January 1901, without obtaining from others and by your own earnings, pay me the sum of Rs. 350 and obtain the right of purchase from me in respect of the lands sold. If you do not pay the amount on that date you shall have no right whatever." The plaintiff having obtained the assignment of the right under the agreement, sued to recover possession on payment of the amount, alleging that the sale-deed and agreement taken together amounted to a mortgage:—*Held*, that the sale-deed and agreement not being between the same parties and being independent transactions could not be construed as constituting a mortgage. *Satul Pershad v. Luchmi Pershad Singh*, (L.R., 10 I.A., 129), followed. *Held also*, that the right conferred by the agreement was personal and not transferable.

Uthandi Mudali v. Ragavachari 307

MORTGAGEE PAYING PRIOR INCUMBRANCE AFTER SALE, RIGHT OF—
Transfer of Property Act IV of 1882, s. 89—Effect of order absolute for sale:

It is settled law that, in the absence of clear proof to the contrary, it is to be taken that, when the money of a person interested in immovable property, as for instance, the owner of the equity of redemption or a puisne mortgagee, goes to discharge an anterior encumbrance affecting it, the presumption is that the anterior encumbrance enures to the advantage of the party making the payment, if it is for his benefit so to treat it; and this rule will apply in favour of a person who, after the sale of the properties in the execution of a decree under mortgage, advances money on the security of such properties to enable the judgment-debtor to set aside such a sale under section 310-A of the Code of Civil Procedure. *Gokaldas Gopaladas v. Purammal Premeekhdas*, (I.L.R., 10 Cal., 1035), referred to and followed. The provisions of section 89 of the Transfer of Property Act have reference to the execution of a mortgage decree and ought not, in reason, to be so construed as to render the application of this principle impossible in cases where an order absolute for sale had been made on the ground that such order extinguished the security. *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi*, (L.R., 29 I.A.), referred to and followed in principle.

Vanmikalinga Mudali v. Chidambara Chetty 37

OATHS ACT X OF 1873, ss. 4, 5:—See "PENAL CODE."

PARTIES, JOINDER OF—Persons jointly interested with plaintiff may be made defendants without proof that they refused to join as plaintiffs:

Where some only out of several persons jointly interested in a cause of action bring a suit impleading the others as defendants, such suit is sustainable though it is not shown that the parties joined as defendants refused to join as plaintiffs. *Pyari Mohun Bose v. Kedarnath Roy*, (I.L.R., 26 Cal., 409), followed. *Biri Singh v. Nawal Singh*, (I.L.R., 24 All., 226), followed.

Peria Karuppan v. Velayutham Chetti 302

PENAL CODE—ACT XLIV OF 1860, s. 193—'Judicial proceeding'—Oaths Act X of 1873, ss. 4, 5—Criminal Procedure Code—Act V of 1898, s. 164—Magistrate empowered to administer oath when taking statements under section 164 of the Criminal Procedure Code:

A Magistrate taking statements under section 164 of the Code of Criminal Procedure is acting in discharge of duties imposed on him by law and is empowered to administer an oath under sections 4 and 5 of the Oaths Act. An investigation under Chapter XIV of the Code of Criminal Procedure is a stage of a judicial proceeding and a person making on oath a false statement in the course of such investigation commits an offence under section 193 of the Penal Code. *Queen-Empress v. Alagu Kone*, (I.L.R., 18 Mad., 421), followed.

Suppa Tevan v. Emperor 89

2. ————, ss. 478, 480—Offence of using false trademark
—No acquisition of the trademark in the sense used in the English Act necessary under s. 478 of the Indian Penal Code—Criminal Procedure Code, Act V of 1898, ss. 227, 233, 234—Joinder of more than three offences in one trial illegal—Trial not validated by striking out charge to cure such defect after case closed, though before judgment:

A person selling soap not manufactured by P, in a box which bears the name of P as a soap manufacturer, uses a false trademark and is guilty of an offence under section 480 of the Indian Penal Code. It is not necessary to constitute an offence under section 478 that a trademark in the sense in which the word is used in the English Patents, Designs and Trade-marks Acts should have been acquired; and the mark is none the less a false mark because it appeared on the box and not on the goods. Under sections 233 and 234 of the Code of Criminal Procedure, a person cannot be charged with more than three offences at one trial; and the defect cannot be cured, after the accused had pleaded and the case had closed, by amending the charges so as to reduce it to three offences. Although the words in section 227 of the Code of Criminal Procedure are wide enough to warrant a Court in altering a charge by striking out one of the charges at any time before judgment, the section does not warrant the striking out of a charge for the purpose of curing an illegality already committed, and after the mischief which the Legislature intended to guard against had been done. *Subrahmanya Ayyar v. King-Emperor*, (I.L.R., 25 Mad., 61), referred to and explained.

Manavala Chetty v. Emperor 569

PRESCRIPTION—Right to cornice acquired by, after 12 years' enjoyment:

Where a man erects a building overhanging the land of another, he commits a trespass for which an action will lie against him and he will by prescription acquire a right to the space occupied by such projection and the right to maintain it in its position. A cornice overhanging a neighbour's land cannot be removed by such neighbour if it has been in existence for more than 12 years. *Mohantal Jechand v. Amrahall Bechardas*, (I.L.R., 3 Bom., 174), referred to and followed.

Bathinavelu Mudaliar v. Kolandavelu Pillai 511

PROBATE AND ADMINISTRATION ACT V OF 1881, ss. 128, 130, 131—Interest allowable on demonstrative legacies—Demonstrative legatee, right of to resort to general assets—Will, construction of—'Labham,' meaning of—Transfer of Property Act IV of 1882, s. 35 (b)—Exception not applicable where debt not the whole consideration :

The word 'Labham' is generic and covers different kinds of profit and in its ordinary and comprehensive sense means profit, gain or income as opposed to the corpus yielding the same and includes interest and dividends and income from immoveable property, especially where other portions of the will show such to have been the intention of the testator. The exception in paragraph (b) of section 135 of the Transfer of Property Act will apply only where the whole of the consideration for the transfer is a debt due by the transferor. The rule that in the case of demonstrative legacies, the legatee is entitled to resort to the general assets on failure of the source intended will not apply where there are directions to the contrary by the testator. Under the English Law, interest is payable on demonstrative legacies from the expiry of one year from the testator's death. *Mullins v. Smith*, (1 Drewry & Smale's Rep., 204), approved and followed. *Lord Lonsborough v. Somerville*, (19 Beav., 295), approved and followed. The same is the law in India and the absence of a distinct provision in sections 128, 130 and 131 of the Probate and Administration Act with respect to interest on such legacies does not imply an intention to disallow interest in such cases.

Chinnam Rajamannar v. Tadikonda Ramachandra Rao ... 155

PROMISSORY NOTE—Collateral covenant not to sue for limited time no bar to suit on—Indorsee with notice of covenant may sue :

A collateral covenant not to sue for a limited time on a promissory note does not suspend the right of action on the note and cannot be pleaded in bar to an action on the note. *Thimbleby v. Barron*, (3 M. & W., 210), referred to and followed. *Ray v. Jones*, (9 C.B.R., (N.S.), 416), referred to and followed. The payee of a promissory note executed an agreement in the following terms :—"You will ever from the 1st of May be paying interest to me on account of the (promissory) note for Rs. 5,000 executed this day by you in my favour, the interest for every month being sent on the first of the next month. I shall take the above rupees five thousand from you after giving jivanamsam (maintenance money) to my mother-in-law, and obtaining a release bond; or I will take the said rupees five thousand after the lifetime of my mother-in-law"—*Held*, that this agreement was only a collateral covenant not to sue for a limited time and was no bar to an action by an indorsee with notice of the agreement.

Somasundaram Chettiar v. Narasimha Chariar ... 212

2. **Promissory note on account of pre-existing loan—Action maintainable on original consideration, even if note unstamped and inadmissible :**

Where a bill or note is not itself the original contract but is executed on account of a pre-existing independent obligation complete in itself, an action on the original obligation is maintainable without regard to such bill or note if it is not paid at maturity, provided the party taking the bill or note has done nothing with it which would render the debtor liable on it to third parties; and the inadmissibility in evidence from any cause of such bill or note will not affect the maintainability of the suit. It will be otherwise if the original cause of action is the bill or note itself. *Sheikh Akbar v. Sheikh Khan*, (I.L.R., 7 Cal., 256), followed. *Pothi Reddi v. Velayudasivan*, (I.L.R., 10 Mad., 94), distinguished.

Varlagadda Veera Ragavayya v. Gorantla Ramayya ... 111

PROVINCIAL SMALL CAUSE COURT ACT IX OF 1887, s. 23—Exercise of power under section 23 gives Court jurisdiction to try suit as an original suit :

Where a question of title which a Court of Small Causes cannot finally determine is involved in a small cause suit, the Court has discretionary power under section 23 of Act IX of 1887 to return the plaint to be presented to a Court having such jurisdiction. The latter Court thereupon

acquires jurisdiction to try the suit as an original suit and is bound to receive the plaint and try it as such. *Mahamaya Dosya v. Nitya Hari Das Bairagi*, (I.L.R., 23 Cal., 425), followed.

Subbaroyadu v. Gangayya ... 329

2. **Suit for rent :**

31—*Suit for rent :*

A suit by a divided coparcener to recover his share of rent from a tenant, and, if he should not be liable, from the other coparcener in whose sole name the lease was executed by the tenant, is substantially a suit for rent and is not as against the coparcener 'a suit for the profits of immoveable property belonging to plaintiff, which have been wrongfully received by defendant' within the meaning of article 31 of the second schedule of the Provincial Small Cause Courts Act.

Srinivasa Raghava Ayyangar v. Pichaikaran ... 184

REGISTRATION—How far compromises in suits exempted from :

A razinamah does not require registration only in regard to such of its stipulations and provisions as are incorporated with and given effect to by the order of the Judge. The provisions of the Registration Act will apply to terms in the razinamah which are not so incorporated. *Pranal Anni v. Lakshmi Anni*, (I.L.R., 22 Mad., 508), followed.

Patha Muthammal v. Esup Rowther ... 365

RELIGIOUS ENDOWMENTS ACT XX OF 1862, s. 7—Rules under—Election—Giving consideration in return for votes, what amounts to—Payment by candidate of expenses to voters who had undertaken to vote for him disqualifies candidate :

On general principles, as well as under rule 19 of the rules framed by the Local Government for the conduct of elections under section 7 of the Religious Endowments Act XX of 1862, a candidate can be held to "give consideration in return for a vote" only when such consideration passes as the result of a bargain. Payment of train fare and carriage expenses by a candidate to voters who had undertaken to vote for him will constitute such payment and such candidate will be disqualified from being elected under the rule. It will be otherwise where the provision for payment is a unilateral act which might be accepted and acted upon or ignored by the other party. The burden lies on the candidate so paying of proving that the payments were otherwise than in return for votes. *Cooper v. Slade*, (6 H.L.C., 746), referred to. *The Bolton Election Petition*, (31 L.T., 194), distinguished.

Krishnaswami Ayyangar v. Sivaswami Udayar ... 166

2. **See "MADRAS REGULATION VII OF 1817, s. 13."**

RENT RECOVERY ACT (MADRAS) VIII OF 1885—Limitation for suits under section 40—Right of attachment when rent is payable in kind—Validity of attachment for arrears due under patta altered subsequently :

Section 40 of the Madras Rent Recovery Act must be read with section 51. The word "month" in the former was intended to be equivalent to the 30 days in the latter and suits under section 40 are within time if presented within 30 days. Attachment proceedings under the Act may be taken when rent is payable in kind. Where a patta under which an attachment was made, is altered, on appeal subsequently, the attachment cannot be upheld even to the extent of the rent in arrears under the altered patta. *Ramachandra v. Narayanasami*, (I.L.R., 10 Mad., 229), not followed.

Vama Dava Desikar v. Murugesu Mudali ... 75

2. ————, ss. 1, 38, 39—Intermediate land-holder tenant for purposes of sections 38, 39 :
An intermediate landholder liable to pay rent to a superior landlord is tenant for the purposes of sections 38 and 39 of the Madras Rent Recovery Act VIII of 1865 and the opinion of the Full Bench in *Nallayappa Pillian v. Ambalavana Pandara Sannadhi*, (I.L.R., 27 Mad., 465 at p. 470), is not in conflict with this view. The true effect of the reference in section 38 to landholders specified in section 3 is to exclude landholders specified in the second paragraph of section 1 of the Act. In a suit under sections 40 and 50 of Act VIII of 1865, it is not competent to the Revenue Court to decide the question of damages sustained by the tenant by non-performance by the landlord of covenants in the lease.
Muthusami Pillai v. Arunachellam Chettiar 79
3. ————, s. 8—Landlord and tenant
—Insertion of unreasonable terms in patta :
Where a tenant disputes the validity of a transfer made by himself to a third party, it is not open to the landlord to recognise the rights of the transferee until the transferee establishes his rights in a way which is binding on the original tenant; and the insertion of words in the patta tendered to the tenant recognising the rights of the transferee will be unreasonable.
Orr v. Rakkumarathi 83
4. ————, s. 9—Landlord and tenant
—Right to issue patta for unassessed house-site :
It being common in this country to have trees in backyards forming part of unassessed house-sites, such a circumstance does not amount to a conversion of such site enjoyed free of rent into cultivated land for which rent is payable and no patta can be tendered in respect of such lands.
Elumalai Chettiar v. Natesa Mudaliar 81
- RES JUDICATA**—Adjudication in previous suit between co-defendants, in active opposition, res judicata in subsequent suit between such defendants :
An adjudication between co-defendants in a previous suit on a point actively contested between them, operates as *res judicata* in a subsequent suit between them, in which they are arrayed as plaintiff and defendant. *Zamorin of Calicut v. Narayanan Mussad*, (I.L.R., 22 Mad., 323), followed. *Ramanuja Ayyangar v. Narayana Ayyangar*, (I.L.R., 18 Mad., 374), distinguished.
Kandiyil Cheriya Chandu v. The Zamorin of Calicut 515
2. ————Bar only when jurisdiction concurrent as regards pecuniary value as well as subject matter—Effect of augmentation of claim by subsequent interest—Transfer of Property Act IV of 1882, s. 85 :
A judgment in a previous suit does not operate as *res judicata* in a subsequent suit in respect of the same subject matter if the value of the matter of relief in the subsequent suit is above the pecuniary limits of the jurisdiction of the Court which decided the previous suit. In order to create an estoppel the jurisdiction of the two Courts must be concurrent as regards pecuniary limit as well as subject matter. *Rajah Rwn Bahadur Singh v. Mussumut Lachoo Koer*, (L.R., 12 I.A., 23), followed. The augmentation of the claim in the first suit by subsequent accrual of interest will prevent the estoppel operating. *Gopi Nath Chobey v. Bhagwat Pershad*, (I.L.R., 10 Calc., 697), distinguished. *Pathuma v. Salimamma*, (I.L.R., 8 Mad., 83), distinguished. Mortgage suits do not form an exception to this rule and the Legislature cannot, in the absence of apt provisions, be presumed to have intended to modify the rule of *res judicata* by enacting section 85 of the Transfer of Property Act. Obiter section 209 of the Code of Civil Procedure does not apply to mortgage decrees.
Giriya Chettiar v. Sabapathy Mudaliar 65

3. ————Decision in previous suit that an agreement barred plaintiff's right—Such decision res judicata though agreement time barred at date of subsequent suit :
A decision, in a previous suit for possession of property, that an agreement to sell executed by the owner of such property in favour of the defendant and a tender of performance by the defendant, disentitled the plaintiff (who was found to have purchased with knowledge of the agreement and tender) to possession, will operate as *res judicata* in a subsequent suit between the same parties on the same cause of action. The fact that at the time the subsequent suit was instituted such contract of sale had become unenforceable by the Law of Limitation will not prevent the operation of the bar, when it is clear from the judgment in the previous suit that the Court did not intend that the defendant should bring a suit for specific performance of the contract.
Adakkalam Chettiar v. Ramalinga Chettiar 320
4. ————See "CIVIL PROCEDURE CODE, ss. 13, 283."
REVERSIONER :—See "HINDU LAW."
REVENUE RECOVERY ACT (MADRAS)—ACT II OF 1884, s. 35, cl. 5, and s. 39—Certified purchaser at revenue sale can be shown to be only benamidar :
Benami purchases are common in India and effect is to be given to them according to the intention of the parties, except so far as positive enactment directs a contrary course. Where land has been sold for arrears of revenue under the Revenue Recovery Act and the name of the purchaser has been published under section 39 of the Act, such proclamation does not preclude any one subsequently from contending that such purchaser was only a benamidar and the real purchaser was some one else. *Muthuvaiyan v. Sinna Samavaiyan*, (I.L.R., 25 Mad., 526), followed. *Narayana Chettiar v. Chokkappa Mudaliar*, (I.L.R., 25 Mad., 656), overruled.
Narayanamsami Padayachi v. Govindasami Padayachi 473
- RIGHT OF SUIT**—Agreement in subsequent deed to pay balance due on a prior document, gives no fresh right of suit when previous obligation not discharged :
Where a promissory note had been executed by the defendant in favour of the plaintiff and some time afterwards the defendant by another document assigned certain decrees to the plaintiff and the document provided that the amounts realized by executing the decrees should be credited towards the amount due on the promissory note and that the defendant should pay any balance that may remain due after the decrees had been realized but the original promissory note had not been cancelled or returned to the defendant or otherwise discharged :—Held, that the plaintiff's only claim was on the promissory note and that the subsequent document conferred no fresh right of suit and that the plaintiff's suit brought after the expiry of the period of limitation for a suit on the promissory note was barred. *Barker's claim*, ((1894), 3 Ch.D., 290), referred to and applied.
Venkataramiah Pantulu v. Ramakrishna Pantulu 295
2. ————Religious endowment suit concerning—person interested as worshipper can be added as party :
Persons interested as worshippers in a public religious institution may be added as parties to a suit instituted by a trustee on behalf of the institution against third parties, if such joinder is considered by the Court as desirable in the interests of the trust. *Narayanamsami Gurukkal v. Irulappa*, (12 M.L.J., 355), followed.
Chidambaram Chettiar v. Sri Rungachariyar 106
- RYOT, RIGHT OF, TO TREES**—Civil Procedure Code—Act XIV of 1882, s. 584—Power of Court on second appeal to examine evidence of usage—Custom :
A ryot holding lands in a zamindari on a permanent tenure would, as regards land on which a money assessment is paid, be *prima facie* entitled exclusively to the trees thereon. Where the crops are shared

between the ryot and zamindar, they will be jointly interested in such trees, but such presumptions may be rebutted by proof of usage or contract to the contrary. *Narayana Ayyangar v. Orr*, (I.L.R., 26 Mad., 252), followed. Although the provisions of section 584 of the Code of Civil Procedure disallow a second appeal with reference to findings of fact, yet, the existence or non-existence of a usage having the force of law is unaffected by such disallowance. Consequently, it is the duty of the Court, when it has to pronounce an opinion upon such question to examine the evidence bearing on it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it. Custom in India is transcendent law. A custom cannot be established by a few instances or by instances of recent date. Observations on the nature of evidence necessary to support custom. *Branjoli Vishnu Nambudri v. Branjoli Krishnan Nambudri*, (I.L.R., 7 Mad., 3), followed. *Hurry Churn Dass v. Nimai Chand Keyal*, (I.L.R., 10 Cal., 138), not followed. *Bai Shrinbai v. Kharshedji*, (I.L.R., 22 Bom., 430), not followed.

Kakarla Abbaya v. Raja Venkata Papayya Rao ... 24

SERVICE TENURE—Grant of land for services—Grant in lieu of wages—Right of grantor to resume land when services are not required—Grant of mokhasa village for long period at unvarying quit-rent—Resumption, suit for:

Where a grant of land is subject to a burden of service, and is not a mere grant in lieu of wages, the grantor has no right to put an end to the tenure whether the services are performed or not, as long as the grantees are willing and able to perform the services. *Leelanund Singh v. Munoorunjun Singh*, (L.R.I.A., Sup., Vol. 181; 13 B.L.R., 124), followed. A mokhasa village had been held by the defendants and their ancestors in a yearly quit-rent of Rs. 144 from a period antecedent to the introduction of British Government on conditions of service to provide a specified number of men as custodians of the grantor's property and to attend him on hunting or military expeditions. The services were rendered intermittently and not continuously, and batta was paid to the grantees when actually on duty. The quit-rent had never varied for a period of 120 years, and there had been no interference with the devolution of the property from heir to heir, nor any instance of resumption during that period:—*Held*, in a suit for resumption by the zamindar that he was not entitled to dispense with the services and resume the village at his option.

Venkata Narasimha Appa Rao Bahadur v. Sobhanadri Appa Rao Bahadur ... 52

SPECIFIC RELIEF ACT I OF 1877, s. 42—Civil Procedure Code—Act XIV of 1882, s. 283—Suit brought under section 283 not liable to dismissal because no further relief asked:

The special right conferred by section 283 of the Code of Civil Procedure on a claimant whose claim is rejected, to sue for a declaration of his title in so far as it is affected by the order passed against him is not controlled by the proviso to section 42 of the Specific Relief Act; and the plaintiff in such a suit is not bound to ask for any further relief to which he may be entitled. *Kunhiamma v. Kunhuni*, (I.L.R., 18 Mad., 140), overruled. *Ambu v. Kettilamma*, (I.L.R., 14 Mad., 23), followed.

Kristnam Sooraya v. Pathma Bee ... 151

s. 42—Declaratory decree—Suit to declare that a person was not adopted by the plaintiff:

The setting up of an adoption alleged to have been made by the plaintiff is such an infringement of his right as sole owner as to entitle him to sue for a declaratory decree under section 42 of the Specific Relief Act declaring that the person alleged to have been adopted is not his adopted son. It is not necessary for the maintainability of such a suit that a claim must be set up by the party alleged to have been adopted.

Chinnasami Mudaliar v. Ambalevana Mudaliar ... 48

SUCCESSION CERTIFICATE ACT VII of 1889, s. 4—Certificate not necessary in so far as the decree is made enforceable against mortgaged property, but necessary so far as the decree imposes personal liability:

A decree for the enforcement of a mortgagee's rights as against the mortgaged property is not a decree for a 'debt' within the meaning of section 4 of Act VII of 1889; but it would be otherwise with reference to a personal decree for the debt, and a certificate will be a condition precedent to such a personal decree. *Fateh Chand v. Muhammad Bakhsh*, (I.L.R., 16 All., 259), not followed.

Palaniyandi Pillai v. Veerammal ... 77

s. 19—See "HINDU LAW."

TRANSFER OF PROPERTY ACT IV OF 1882, s. 6—See "HINDU LAW."

ss. 14, 15 and 123—Trust validly created by registered instrument without delivery of possession—Sections 14 and 15 of the Transfer of Property Act do not affect any rule of Hindu Law—Hindu Law—Gift—Settlement on persons then in existence at close of a life in being valid—Trusts Act II of 1882, s. 6:

R. by a registered deed of settlement settled property in trust and after making various provisions for the maintenance of himself and his wife and his grand-daughters V. and R., further provided that on the death of the survivor of the grand-daughters, the trustees were to hold the property in trust for the sons of the grand-daughters who attain 18 and the daughters of the grand-daughters, who should attain that age or marry. A female child on the consummation of marriage or on attaining 18 was to be given Rs. 1,000, and a male child on attaining age was to be given his share of the property. The settler did not give possession of the properties to his trustees but remained in possession till his death. In a suit by the reversioners of R. to set aside the settlement as null and void:—*Held*, that a transfer of property and a valid declaration of trust were effected by the registered deed though unaccompanied by physical delivery of possession and that nothing in section 6 of the Trusts Act was in conflict with this view. *Held also*, that the settlement by way of remainder in favour of the sons of V. & R. (such sons being in existence at the date of the settlement) was valid under the Hindu Law. A settlement by way of remainder to take effect on the happening of an event following immediately on the close of a life in being is good. *Srumuthy Soorjmoney Dossu v. Denobundoo Mulluk*, (9 M.I.A., 184), followed. A bequest to a class, some of whom could not take, is not void but will enure for the benefit of such of the class who can take. The rule in *Leake v. Robinson*, (2 Mer., 363), does not apply to the wills of Hindus. *Bhagabati Barmanya v. Koli Charan Singh*, (I.L.R., 32 Cal., 992), referred to and followed *Ram Lal Sett v. Kanai Lal Sett*, (I.L.R., 12 Cal., 663), referred to and followed. Sections 14 and 15 of the Transfer of Property Act do not affect the rule of Hindu Law above stated and do not apply to Hindu wills. In determining the validity or otherwise of dispositions of property under sections 14 and 15 of the Transfer of Property Act regard must be had to possible events and not to events as they have actually happened; and if it is possible that the vesting may be postponed beyond the limits fixed by the sections, the disposition will be bad although, as events actually happened, it was not so postponed.

Ranganadha Mudaliar v. Bagirathi Ammal ... 412

s. 35 (b)—Exception not applicable where debt not the whole consideration—Will, construction of—'Labham,' meaning of—Probate and Administration Act V of 1881, ss. 128, 130, 131—Interest allowable on demonstrative legacies—Demonstrative legatee, right of to resort to general assets:

The word 'Labham' is generic and covers different kinds of profit and in its ordinary and comprehensive sense means profit, gain or income as opposed to the corpus yielding the same and includes interest and dividends and income from immoveable property, especially where other portions of

the will show such to have been the intention of the testator. The exception in paragraph (b) of section 135 of the Transfer of Property Act will apply only where the whole of the consideration for the transfer is a debt due by the transferor. The rule that in the case of demonstrative legacies the legatee is entitled to resort to the general assets on failure of the source intended will not apply where there are directions to the contrary by the testator. Under the English Law, interest is payable on demonstrative legacies from the expiry of one year from the testator's death. *Mullins v. Smith*, (1 Brewry & Smale's Rep., 204), approved and followed. *Lord Londesborough v. Somerville*, (19 Beav., 295), approved and followed. The same is the law in India and the absence of a distinct provision in sections 128, 130 and 131 of the Probate and Administration Act with respect to interest on such legacies does not imply an intention to disallow interest in such cases.

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4. _____, ss. 37, 109—*Misjoinder of parties and causes of action*—No misjoinder where one relief merely ancillary—Landlord and tenant—Rights and liabilities of joint lessors and lessors who are tenants in common:

A suit is bad for misjoinder where there is a joinder of two causes of action, in each of which, all the defendants are not interested. Where, however, there is really only one cause of action against some defendants, and the relief claimed against the other defendants is only ancillary to the relief to be given to the plaintiff in respect of such cause of action, the suit is not bad for misjoinder. *Saminada Pillay v. Subba Reddiar*, (I.L.R., 1 Mad., 333), distinguished. *Per Sir S. SUBRAHMANYA AYYAR*, Offg. C.J.—A tenant in common may have ejectment to the extent of his interest, on proper notice to quit; and the inclusion in such a suit of the other co-sharers, as defendants is merely the inclusion of persons properly parties to the proceeding and not of litigants against whom a separate claim, having no connection with the ejectment, is made. *Per SANKARAN NAIR, J.*—The distinction between the law in England and India as to the rights and liabilities of joint lessors and lessees discussed and explained; as also the rights of lessors who are tenants in common. Case law, English and Indian, on the subject, considered. Where the relation is created by contract with several joint landlords, according to the English cases, such relation subsists only so long as all of them wish it to continue, while according to the Indian cases it subsists until all of them agree to put an end to it; and such a contract cannot, in the absence of special circumstances, be put an end to by any one of them if they continue to hold as joint tenants. This principle, however, will not apply when the suit is for ejectment and partition and all the co-owners are made parties. The principles embodied in sections 37 and 109 of the Transfer of Property Act ought to be applied in such cases, though they are not expressly declared applicable. When the lessor recognises the right of another in the premises demised, all the obligations of the lessee, as to payment of rent and surrender of possession, must, if such obligations be severable, and the lessee will not be prejudiced by such severance, be performed by the lessee between the lessor and such other, in such proportions as may be settled by all the parties concerned, including the lessee. If the matter has to be decided by suit, the lessor, lessee and such other person will be necessary parties.

Sri Raja Simhadri Appa Rao v. Prattipati Ramayya ... 29

5. _____, s. 40—*Trust Act II of 1882, s. 91*—Mortgages with knowledge of facts which might have revealed the existence of an equitable right, bound by such right:

Where a mortgagee, at the time of his mortgage, is aware of circumstances which ought to have put him on enquiry, and such enquiry if made would have revealed the existence of an agreement by the mortgagor to mortgage the property to a third party, the mortgagee's rights, will, on the principles embodied in section 40 of the Transfer of Property Act and section 91 of the Trusts Act, be postponed to the rights of such third party.

Kameswaramma v. Sitaramanuja Charlu ... 177

6. _____, s. 43—*Mortgagor acquiring the mortgaged property cannot use the mortgage right as a shield against subsequent mortgages executed by himself:*

The doctrine that a person paying off a mortgage or purchasing the mortgage property in execution of a decree on the mortgage can set up such mortgage as a shield against puisne incumbrancers will not, on the principle embodied in section 43 of the Transfer of Property Act, apply when the person so paying or purchasing is the mortgagor himself. The effect of the payment or purchase in such cases so far as the mortgagor and those claiming under him are concerned will be simply to extinguish the mortgage, and the rights of subsequent incumbrancers will be determined as if such prior mortgage never existed.

Manjappa Roi v. Krishnayya ... 113

7. _____, s. 52—*Lis pendens—Suit for maintenance by widow praying it to be charged on immovable property—Right to immovable property in dispute in such suit:*

A suit in which a widow claims to get her maintenance made a charge on immovable property is one in which a right to such immovable property is directly and specifically in question within the terms of section 52 of the Transfer of Property Act; and any transfer of the property during the pendency of the suit, not effected for the purpose of paying off any debt entitled to priority over the claim for maintenance will be affected by the *lis pendens* created by the suit. *Bazayet Hossain v. Dooli Ohund*, (I.L.R., 4 Calc., 402 at p. 409), referred to and followed.

Dose Thimmanna Bhutta v. Krishna Tantri ... 508

8. _____, s. 52—*The doctrine of lis pendens applies to cases in which decrees are passed on compromise—'Contentious suit or proceeding,' meaning of:*

The doctrine of *lis pendens* as embodied in section 52 of the Transfer of Property Act applies to transfers effected during the pendency of a contentious suit of proceeding, even when such suit or proceeding is subsequently compromised and a decree passed in pursuance of such compromise, provided such compromise is not tainted by fraud or collusion. The word 'contentious' is used in section 52 of the Transfer of Property Act in the sense in which it is used in Probate Practice and means the opposite of common form or voluntary business.

Annamalai Chettiar v. Malayandi Appaya Naik ... 426

9. _____, s. 54—*Enforceable contract of sale followed by delivery of possession to defendant, but not followed by registered sale-deed no defence to suit for possession—Construction of statute:*

The provisions of section 54 of the Transfer of Property Act are imperative, and Courts will not be justified in disregarding them on equitable grounds. Where the words of a statute are clear and unambiguous, effect must be given to them, although hardship may result in individual cases. A contract of sale followed by delivery of possession does not, when there is no registered sale, create any interest in the property agreed to be sold and cannot, even if enforceable at date of suit or decree, be pleaded in defence to an action for ejectment by one having a legal title to recover. *Ramasami Pattar v. Chinnan Asari*, (I.L.R., 24 Mad., 449), approved. *Immudipattam Thirugnana Kondama Naik v. Periya Dorasami*, (I.L.R., 24 Mad., 377), considered.

Kurri Veerareddi v. Kurri Bapireddi ... 336

10. _____, s. 55—*Limitation Act XV of 1877, sch. II, arts. 132, 111—Article 132 applies to suits to enforce the charge created by s. 55 of the Transfer of Property Act:*

The statutory charge which an unpaid vendor obtains under section 55 of the Transfer of Property Act is different in its origin and nature from the vendor's lien given by English Courts of Equity to an unpaid vendor.

Webb v. Macpherson, (I.L.R., 31 Calc., 57), referred to and applied. The article of the Limitation Act applicable to a suit to enforce such charge is article 132 of schedule II and not article 111. *Natesan v. Chetti Soundararaja Ayyangar*, (I.L.R., 21 Mad., 141), overruled. *Avuthala v. Dayamma*, (I.L.R., 24 Mad., 233), overruled. *Subrahmania Ayyar v. Poovan*, (I.L.R., 27 Mad., 28), overruled.

Ramakrishna Ayyar v. Subrahmania Ayyen ... 305

11. ... ss. 55 (2), 108 (b)—Art. 116, sched. II of the Limitation Act will apply only when the transaction is one to which section 55 (2) or 108 (b) of the Transfer of Property Act will apply and a covenant of title or quiet enjoyment can be implied—Limitation Act XV of 1877, sched. II, arts. 62, 97, 116:

The first defendant, in September 1897 granted in consideration of an advance a registered karar to P, the predecessor in title of the present plaintiff, in the following terms: "Deed of consent or permission granted to . . . by . . . In consideration of this amount, the trees standing . . . shall be cut down at your expense during a period of 6 years from this date, with the exception of teak and blackwood. For every cart load of timber so removed . . . you are to pay a kuttikanam of Rs. 2-4-0 and on those timber, the seal of the Etam shall be impressed without delay . . . During the period of 6 years, the Etam shall not grant any permission to others to cut trees . . . You have the right to cut down trees and none whatever to the land."

The first defendant and the other defendants formed a Tarward and in a suit brought on behalf of the Tarward against P and the first defendant, it was declared that the karar was not binding on the Tarward and P was restrained from cutting timber. The present suit was instituted by P to recover personally from the first defendant and from the Tarward properties the amount advanced with interest as damages:—*Held*, that the suit so far as the Tarward properties were concerned was *res judicata* by reason of the decision in the previous suit. *Held also*, that the suit as against the first defendant was barred by limitation. The article applicable to the suit is either article 62 or article 97 of schedule II of the Limitation Act. The document is not a sale or lease of immovable property within the definition of those terms in the Transfer of Property Act and a covenant for title or for quiet enjoyment cannot be implied under section 55 (2) or section 108 (b) of the Act. Article 116 of schedule II of the Limitation Act does not apply to the case. The document did not create a mortgage or charge on immovable property. It is no more than an exclusive license to cut trees. A document may create an interest in land and bring it within the provisions of the Registration Act. The covenant of title will not necessarily be implied in such cases, unless it is one of the transactions in which the covenant can be implied under the Transfer of Property Act. *Seeni Chettiar v. Santhanathan Chettiar*, (I.L.R., 20 Mad., 58), followed.

Mamikutti v. Puzakkal Edom ... 353

12. ... s. 55 (5) (d)—Where no contract to the contrary, liability to pay public charges attaches to vendee on the passing of property—Condition precedent to liability—Limitation Act XV of 1877, s. 19—Requisites of a valid acknowledgment:

Under section 55 (5) (d) of the Transfer of Property Act, the liability of the vendee to pay the public charges on the property sold attaches, in the absence of a contract to the contrary, as an incident of the transfer and is complete when the property passes. Where the adjustment of matters, which form part, but are not the essence and substance of the contract, cannot be carried out in the mode contemplated, the Court will do whatever may be right and proper to effect such adjustment itself. *Dinham v. Bradford*, (L.R., 5 Ch., App. 519), referred to. Where a deed of sale provides that the vendee shall pay "the amount due, as per sub-division of the peshkush due to Government" and the deed contains no other words to show that the sub-division was a pre-requisite to the vendee's liability, the mere use of the words *as per sub-division* does not make it such and, where no sub-division is effected, and the vendor pays the whole peshkush,

the Court will ascertain, as between the vendor and vendee, the proportion payable by the latter and direct payment thereof. An acknowledgment of a conditional liability will not, under section 19 of the Limitation Act, give a fresh start as long as the condition remains unfulfilled. There must be an unqualified admission or an admission qualified by a condition which is fulfilled.

Rajah Kavali Arunachella Row Bahadur v. Sri Raja Rangiah Appa Row Bahadur ... 519

13. ... s. 58—Mortgage by conditional sale—Whether sale or mortgage to be ascertained from whole instrument—Transfer of interest need not be in express terms—"Meddatu Krayam" meaning of:

The question whether a document operates as a mortgage, or as a conditional sale must be determined on a consideration of the whole document. The mere description of the document as "Meddatu Krayam" is not conclusive. The transfer of interest necessary to create a mortgage need not be in express terms. It is sufficient if the instrument taken as a whole operates to create such a transfer.

Kola Venkatanarayana v. Vuppala Ratnam ... 531

14. ... s. 68 (b)—Holder of unregistered mortgage deprived of his security by subsequent registered sale to third party can sue under s. 68 (b) of the Transfer of Property Act—The section applies even when there is a covenant to pay—Notice of prior unregistered mortgage effect of:

Where the owner of properties after having mortgaged them under an unregistered deed, sells them for valuable consideration by registered deed to one who has no notice of the mortgage, the mortgagee is deprived of his security by the wrongful act of his mortgagor and is entitled to sue the mortgagor for his money under section 68 (b) of the Transfer of Property Act. Such right exists independently of, and is not taken away by, any covenant to repay contained in the mortgage deed. The purchaser under a registered sale-deed has no priority over a prior unregistered mortgage of which he has notice.

Appasami Thevan v. Virappa Thevan ... 362

15. ... s. 83—Money deposited under, becomes property of mortgage only when conditions stated in section complied with:

Money deposited in Court by the mortgagor for payment to the mortgagee under section 83 of the Transfer of Property Act does not become the property of the latter until he has complied with the conditions prescribed by the section as conditions precedent to his drawing the money out of Court. *Dal Singh v. Pitam Singh*, (I.L.R., 25 All., 179), followed.

Mothiar Mira Taragan v. Ahmatti Ahmed Pillai ... 382

16. ... s. 85:—See "RES JUDICATA."

17. ... s. 85—Does not authorise Court to introduce unnecessary complications—Mortgagee not compellable to distribute liability among mortgaged properties—Contribution right of against properties not included in suit—Marshalling not compellable so as to prejudice mortgagees—Power of Court executing mortgage decree:

There is nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of the equity of redemption the mortgagee is bound to distribute his debt rateably upon the mortgaged properties. *Timmappa v. Lakshamma*, (I.L.R., 5 Mad., 386), referred to. He may, however, be compelled to do so when by his act he has prejudicially affected the rights of the holders of the properties to contribution among themselves. Where some only have been compelled to pay the whole debt, they are entitled to contribution from the other parties who are liable, though the properties in their hands have not been included in the suit. *Jagat Narain v. Qutub Husain*, (I.L.R., 2 All., 807), followed. *Chagandas v. Gansing*, (I.L.R., 20

Bonn, 615), followed. *Semle*: Where, however, the mortgagor sells not merely the equity of redemption but conveys a portion of the property itself free from any liability to contribute to the mortgage debt, the purchaser may insist upon the mortgagee proceeding, in the first instance, against the property in the hands of the mortgagor. Marshalling cannot be enforced so as to compel a mortgagee to proceed against a security which may be insufficient or may involve him in litigation to realise. *Flint v. Howard*, (I.R., (1893), 2 Ch.D., 54), distinguished. *Ram Dhun Dhur v. Mohesh Chunder Chowdhry*, (I.L.R., 9 Cal., 406), distinguished. *Obiter*: It is competent to the Court in executing a mortgage decree to exercise its control in bringing the different items of property comprised in the decree to sale in a particular order to adjust the equities of the parties before it who are interested.

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18. —, ss. 85, 96—Mortgage decree need not reserve rights admitted by all parties—Decree must be construed with reference to pleadings:

There is nothing in the provisions of the Transfer of Property Act, which requires that a decree in a mortgage suit should in terms reserve rights admitted by all the parties and order the sale to be subject to them and section 96 of the Act does not militate against this view. *Quære*, whether section 85 of the Act requires such persons whose rights are admitted to be made parties. Where the decree omits to reserve such rights, it ought to be construed with reference to the admissions contained in the pleadings or made in the course of the case and ought not to be so construed as to grant a larger measure of relief than is prayed for or to negative rights admitted by all parties.

Srinivasa Rao Saheb v. Yamunabhai Ammall ... 84

19. —, s. 89—Effect of order absolute for sale—Mortgagee, paying prior incumbrancer after sale, right of—:

It is settled law that, in the absence of clear proof to the contrary, it is to be taken that, when the money of a person interested in immoveable property, as for instance, the owner of the equity of redemption or a puisne mortgagee, goes to discharge an anterior encumbrance affecting it, the presumption is that the anterior encumbrance enures to the advantage of the party making the payment, if it is for his benefit so to treat it; and this rule will apply in favour of a person who, after the sale of the properties in execution of a decree on the anterior mortgage, advances money on the security of such properties to enable the judgment-debtor to set aside such a sale under section 310-A of the Code of Civil Procedure. *Gokaldas Gopaladas v. Purammal Premeukhdas*, (I.L.R., 10 Cal., 1035), referred to and followed. The provisions of section 89 of the Transfer of Property Act have reference to the execution of a mortgage decree and ought not, in reason, to be so construed as to render the application of this principle impossible in cases where an order absolute for sale had been made on the ground that such order extinguished the security. *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi*, (I.R., 29 I.A.), referred to and followed in principle.

Vanamikalanga Mudali v. Chidambara Chetty ... 37

20. —, s. 99—Not merely declaratory of old law—Purchase by mortgagee of equity of redemption in execution of decree not based on mortgage—Effect of on the rights of sons of mortgagor:

Section 99 of the Transfer of Property Act is not merely declaratory of what was accepted and enforced as law before the passing of the Act and effect ought not to be given to the new restrictions imposed by that section so as to give them retrospective operation. *Muthuraman Chetty v. Ettappasami*, (I.L.R., 22 Mad., 372), distinguished. When the mortgagee, at a Court-sale perfected before the passing of the Act, and brought about in respect of a claim independent of the mortgage, purchases the right of

redemption in the mortgaged property, such purchase passes to him the whole interest as effectually against the sons of the judgment-debtor as against the judgment-debtor himself and the sons cannot sue to redeem the property so sold or their share therein.

Nannuvien v. Muthusami Dikshadar ... 421

21. —, ss. 99, 67—Holder of usufructuary mortgage attaching mortgaged property for a decree on an independent claim may sue under s. 67 on the mortgage:

Where a usufructuary mortgagee, who had no right to sue for his mortgage amount, obtained a decree against the mortgagor on a claim independent of the mortgage and in execution of such decree attached the interest of the mortgagor in the mortgaged properties:—*Held*, that he was entitled under the provisions of section 99 of the Transfer of Property Act to bring a suit on his mortgage under section 67 of the Act. The decree in such a suit should be one for the sale of the property free from the mortgage claim and for the application of the sale-proceeds in satisfaction of the mortgages on the property, the balance if any to be applied towards the claim under attachment.

Govinda Bhatta v. Narain Bhatta ... 424

TRUST ACT II OF 1882:—See "HINDU LAW."

2. —, s. 81—No right to recover even where unlawful agreement only partly carried out—Decision not bad although no distinct issue when parties not taken by surprise:

The rule that a person *in pari delicto* cannot recover, is applicable not only where the unlawful agreement has been fully carried out but also where there has been part performance of a substantial character of such agreement. This is the construction which ought to be placed on the words 'not carried into execution' in section 84 of the Indian Trusts Act. Where a point, on which there is no distinct issue, is present to the minds of the parties, the decision on such point cannot be impeached on the ground that there was no issue raised.

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3. —, s. 91:—See "TRANSFER OF PROPERTY ACT, s. 40."

TRUSTEE—Person not entitled obtaining renewal of a promissory note, trustee for rightful owner—Misjoinder of parties:

Where on the death of the payee of a promissory note executed by D C becomes entitled to the amount, but A obtains a renewal from D in favour of B, a suit will lie by C against D, A and B as defendants to recover on the renewed note, as A and B in obtaining the renewal must be held in law to have become trustees for C. A and B are necessary parties and the suit will not be bad for misjoinder. The only person entitled to object to C's claim will be D.

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WILL CONSTRUCTION OF—Fund specified, liable for debts and expenses even when there is a residue undisposed of:

Where a will directs that the funeral and testamentary expenses should be paid out of a legacy but makes no disposition of the residuary estate, such expenses will nevertheless be payable out of the fund specified and the fact that the testator at the time she made the will was not aware that she had a residue to dispose of, will not justify the Court in speculating upon what she would or might have done had she been aware of it, and departing from the express directions of the will, to make a new will for her.

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2. ————— 'Labham,' meaning of—*Transfer of Property Act IV of 1882, s. 35 (b)*—*Exception not applicable where debt not the whole consideration—Probate and Administration Act V of 1881, ss. 128, 130, 131—Interest allowable on demonstrative legacies—Demonstrative legatee, right of to resort to general assets:*

The word 'Labham' is generic and covers different kinds of profit and in its ordinary and comprehensive sense means profit, gain or income as opposed to the corpus yielding the same and includes interest and dividends and income from immoveable property, especially where other portions of the will show such to have been the intention of the testator. The exception in paragraph (b) of section 135 of the *Transfer of Property Act* will apply only where the whole of the consideration for the transfer is a debt due by the transferor. The rule that in the case of demonstrative legacies, the legatee is entitled to resort to the general assets on failure of the source intended will not apply where there are directions to the contrary by the testator. Under the English Law, interest is payable on demonstrative legacies from the expiry of one year from the testator's death. *Mullins v. Smith*, (1 *Drewry & Smale's Rep.*, 204), approved and followed. *Lord Lonsborough v. Somerville*, (19 *Beav.*, 295), approved and followed. The same is the Law in India and the absence of a distinct provision in sections 128, 130 and 131 of the *Probate and Administration Act* with respect to interest on such legacies does not imply an intention to disallow interest in such cases.

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APPELLATE CIVIL.

Before Sir S. Subrahmaniam Ayyar, Offg. Chief Justice, and
Mr. Justice Sankaran Nair.

ROOP LAUL AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

LAKSHMI DOSS (DEFENDANT), RESPONDENT.*

1905.
August 3, 4,
8, 9, 17, 29.
September 5.

Hindu Law—Charitable trusts, when colorable—Limitation Act XV of 1877, art.

91—*Laches, undue influence, deed executed under—Fiduciary relation, deed between persons standing in—Letters Patent, cl. 36.*

A deed of trust can be held to be nominal only, when no charity or trust is brought into existence, when there is no proof of the application of the alleged endowments for the maintenance thereof, and the whole conduct of the parties is inconsistent with the hypothesis of a genuine trust.

Per Sir S. SUBRAHMANIAM AYYAR, Offg. C.J.—The provisions in a trust deed denying to the public any interest in the charities and authorising the change of the trust property are not inconsistent with the creation of a valid trust; and even if they were, they would be only invalid conditions annexed to a valid trust.

The doctrine that Courts will regard with jealousy transactions between persons standing in the fiduciary relation of parent and child will not apply when no advantage is secured to the former at the expense of the latter; and where the properties are already impressed with the trust, the appointment of the father, as sole trustee, is no such advantage as such a right exists under the Hindu Law.

Purappavanalingam Chetti v. Nullasica Chetti (1 *M.H.C.R.*, 415).

A party who has not sued within the period prescribed by article 91, schedule II of the *Limitation Act* to set aside an instrument on the ground of undue influence cannot be heard in derogation of the rights created by it.

Kanki Kumbar v. Ajit Singh, (1 *L.R.*, 15 *Calo.*, 58), followed.

* Original Side Appeal No. 11 of 1905, presented against the judgment of Mr. Justice Boddam in Original Suit No. 168 of 1903.

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One of two executors of a deed cannot, after the death of the other, set up the undue influence exercised by that other to defeat the rights of beneficiaries under the deed, when he had ample opportunities to do so in the lifetime of the other, and when if he had done so, the other party would have had legal power to carry out his intentions in favour of the beneficiaries by other means.

Per SANKARAN NAIR, J.—The provision that the public shall have no interest in the trust converts it into a private trust, if any trust is created which can be put an end to at any time; and the right to change the properties and to exclude or withdraw them as conferred by the deed implies a power not to create a trust so far as any or all of such properties are concerned. The above are not simply invalid provisions annexed to a valid trust, but rather negative the creation of any valid irrevocable trust at all.

Where the author of an alleged trust intended to create a trust only enforceable after his death, reserving power to himself to dispose of the properties, such trust cannot after his death be enforced at the instance of a volunteer even so far as the properties as he may not have disposed of are concerned.

A trust will be void if the subject of it is uncertain, as when it is to attach to such properties as the author should not dispose of during his life.

The doctrine applied by Courts of Equity in regard to transactions between persons standing in the fiduciary relation of father and child will apply even when the father takes only as trustee. The ground of interference in such cases is not any benefit derived by the father, but the presumption that the son was not a free agent. The rule will apply when the person claiming is a volunteer with notice of the confidential relation; and the burden will be on such person to show that the son understood the terms and did form an independent opinion on the matter. Recitals in the deed calculated to produce irresistible moral pressure, as the alleged wishes of ancestors, etc., will be evidence of an improper exercise of parental influence, when such recitals are not true.

By Court.—Section 575 of the Code of Civil Procedure does not apply in the case of appeals under clause 15 of the Letters Patent from judgments of the High Court in the exercise of its Original Jurisdiction. Under clause 36 of the Letters Patent where the Judges are equally divided in opinion, the judgment of the Senior Judge will prevail.

Suit by the plaintiffs to recover the amount due to them as annuity under the terms of an instrument of trust executed in 1887 by the defendant and his adopted father, since deceased.

The facts are very fully set out in the judgments of their Lordships.

K. Narayana Row and C. P. Ramaswami Ayyar for appellants.

The Advocate-General (Hon. Mr. J. P. Wallis) and Mr. A. Read for respondent.

JUDGMENTS.—*Sir S. SUBRAHMANIA AYYAR, Offg. C.J.*—The plaintiffs Nos. 1 to 4 are the sons of one Muni Lall deceased and the fifth and sixth plaintiffs are the widow and minor daughter of a deceased son of the first plaintiff. Muni Lall was the illegitimate son of Kundun Lall, the paternal uncle of the defendant's

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adoptive father Rajah Easwara Doss. Mukund Lall, the grandfather and Teekumchand father of Easwara Doss, and Kundan Lall were Sowcars and apparently successful in their profession. Easwara Doss was certainly so and he died possessed of considerable property. The defendant (Lakshmi Doss) when quite a boy was adopted about the year 1873 or 1874 and continued to live with his adoptive father down to the time of the latter's death in 1900 and succeeded to the estate as the sole surviving member of the family.

The plaintiffs seek to establish their right to a monthly payment of Rs. 35, out of certain alleged trust properties in the hands of the defendant, and for arrears thereof. The sustainability of this claim depends upon the effect, if any, to be given to the registered instrument bearing date the 28th January 1887 described as a settlement and executed by Easwara Doss and the defendant.

The instrument, which is in English having been drawn up by Messrs. Branson & Branson, the solicitors of the family of Easwara Doss, is a long document containing much detailed provision with reference to the matters dealt with by it. For the present purpose it is not necessary to summarise them all. It is sufficient to state the following. It recites that the grandfather of Easwara Doss (who died about 1826) originated certain charities and set apart for the purpose a fund of Rs. 2,000; that the fund accumulated to Rs. 20,000 at the death of the father of Easwara Doss; that certain sites were acquired in Triplicane by Kundan Lall and Easwara Doss for the purpose of erecting a temple to be devoted to the worship of Siva, buildings were constructed thereon and a temple called Camacala Cameswara Swamy Temple was established about 35 years previously with quarters for the occupation of persons rendering service in the temple; that the institution with its said appurtenances has since been maintained; that disbursements have also been made for the performance of a festival in the well-known shrine of Sree Parthasaradhy in the same suburb of Madras as also in the temple in Tiruvallur; that a rest-house for the accommodation of Hindustani Brahmans travelling from the Deccan was likewise established and has been maintained, *Sadavarthi* or rations being distributed to such travellers; that certain payments out of the trust funds by way of annuities to dependents of the family were being made as directed by the father of Easwara Doss; that when Easwara Doss'

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uncle died about 1860 the trust funds had increased to a little over a lakh of rupees ; that the same came up at the date of the instrument to about a lakh and fifty thousand ; and that it was agreed between the parties to the instrument that the trust properties should be separated from other properties held by the parties and a regular settlement in the matter made. The instrument provides a detailed scheme for the future maintenance and administration of the charities and trusts and for the appointment of a trustee and of a Dharmakartha or Manager under the trustee. It enumerates the powers and duties of the two office-holders, respectively, gives directions as to the terms and conditions as to disbursement, duration and lapse of the annuities with other details connected with the various matters and concludes with three schedules, schedule A specifying the trust properties as they stood at the time, schedule B, the scale of expenditure to be made in connection with the temple, choultry, etc., and schedule C the scale of payments to the annuitants.

Item No. 8 of schedule C is the one under which the plaintiffs claim and it runs as follows : -- " Rs. 35 a month to the family of Muni Lall for their maintenance so long as his four sons and Rathakishnan Lallah, the son of Roop Lalla, who is the eldest of them and their families shall live together same shall be paid to the said Roop Lallah and after him to the eldest male managing member of their family so long as there shall be any direct male descendant of the said Muni Lalla ; but if they or their representatives shall separate, the said sum of Rs. 35 shall be divided equally amongst them five (that is to say) amongst the said Roop Lallah and his said son and three brothers and their respective representatives respectively and Rs. 7 a month shall be paid to each of them and continued after them to their representatives respectively with benefit of survivorship."

I now proceed to consider the points raised in the argument before us.

The first contention on behalf of the defendant was that the instrument was a mere sham or nominal document not intended to be acted upon and not acted upon. With reference to the evidence in the case I find it impossible to accept this contention. The present is altogether unlike the instances which the Courts had to deal with in the cases referred to by the learned Advocate-General and in which there was no charity or trust actually

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brought into existence, there was no proof of the application of the alleged endowments for the maintenance thereof and the whole conduct of the parties was inconsistent with the hypothesis of a genuine trust. There is no doubt here that a temple with appurtenant buildings and a rest-house answering to the description thereof in the instrument were constructed by members of the family. That the worship in the one and the distribution of alms in the other as well as the performance of the festivals in the Parthasaradhy, and the Tiruvallur Shrines and of the *fathias* specified in schedule B have been carried on with funds supplied by Easwara Doss or his predecessors, is likewise clear from the evidence. The first plaintiff Roop Laul speaks to most of these matters. Kuppuswamiah who has been employed for 30 years to recite vedas in the temple and who has for the same period been residing in the quarters provided for temple servants proves that during the whole time services in the temple have been uniformly maintained. Parthasaradhy Aiyangar, Manager of the Parthasaradhy Shrine referred to before, testifies to the performance of two festivals at that shrine, the same being paid for by Easwara Doss during his lifetime and by the defendant subsequently. Sugu Nandan sometime back a servant of Easwara Doss speaks to like performances of festivals at Tiruvallur, etc. Another witness Ram Lall gives evidence as to the performance of *fathias*. Janakiramayya formerly gumastah under Easwara Doss and now under the defendant, admitted that the charities mentioned in the trust deed have been carried on since prior to the time the witness became acquainted with his late employer which was before the trust deed was executed. Bunsilal, another witness of the defendant, was himself employed in distributing *sadhavarthi* in the choultry during Easwara Doss' lifetime. The defendant when in the box did not, as he could not, deny what was being done in the temple, in the choultry, and elsewhere, though he tried to dissociate the same from the trust deed by speaking of them as private charities requiring no Dharmakartha or Manager. The unquestionable fact of the existence and maintenance of those institutions for many years in the way stated above goes to the very core of the matter and argues almost irresistibly in favour of the reality of the transaction evidenced by the instrument in question. Nor are other cogent circumstances in favour

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of the same view wanting. It is not easy to believe that a person concocting a bogus document would have taken the pains to propound and work out so elaborate a scheme of management as that stated in the instrument. Undoubtedly we find Easwara Doss when purchasing the Tinnanore Jaghir (item No. 6 of the plaint, schedule B) for a lakh and odd rupees three years after the trust deed, taking the conveyance to him as "Dharmakhartha of Sree Kameswaraswamy Temple." In 1897, *i.e.*, ten years after the document in question, Easwara Doss again adopts the same description with reference to the entry in the Collector's register respecting certain house sites which had been acquired in connection with the charities previously. Stronger than all these is the evidence furnished by the will of Raja Easwara Doss executed on the same day as the instrument in question and left along with it in the custody of his solicitors. This will was not revoked, and it was admitted in the argument that after Easwara Doss' death the Official Trustee was informed that he had been appointed by the will as the successor of Easwara Doss in the office of trustee by virtue of the power reserved to Easwara Doss in the matter under the settlement. That a man getting up a fictitious trust deed should wish it to be acted upon after his death in the manner contemplated by this will, nay, select a public official for the purpose of co-operating in the matter is well nigh absurd. Lastly it is difficult to discover even the slightest ground, in the circumstances of Easwara Doss then or about the time, as to why he should think of making a nominal document of the kind. That at the date of the deed he was not only not in pecuniary difficulties of any kind but that his affairs were prosperous, is shown by his will. It shows that his debts were small while in the shape of Government promissory notes alone, not to speak of other property, he possessed about two lakhs and-a-half excluding the lakh and fifty thousand worth of such securities stated to belong to the trust but used along with the other Government promissory notes in the salt trade then carried on by him. Nor does it appear that he was then engaged in or contemplated entering into any hazardous trade or speculation which would suggest the necessity of screening property from the claim of possible creditors. In these circumstances it is impossible to come to the conclusion that the instrument in question was any thing but genuine, executed at least so far as Easwara Doss was

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concerned, for ensuring the continuance of charities which his ancestors had founded and which he had himself as in duty bound kept up, and which, naturally enough, he was anxious should be administered by a machinery as efficient as he and his legal advisers could devise.

I can attach no weight to the two or three circumstances on which considerable stress was laid on behalf of the defendant in this connection. It does appear that even after the deed, entries in connection with the charities were made only in personal accounts kept by Easwara Doss. Though when the question is whether there was a completed dedication of a charity, the absence of separate accounts in respect of it may not be without significance, yet in the face of the indubitable evidence of the anterior existence of the charities and trusts in question here, and of the unequivocal evidence thereof deliberately brought into existence in the shape of such a deed executed by both and the only persons interested in the matter such an omission as that relied on does not outweigh the effect of the former. It also no doubt appears that the disbursements on account of the different charities, even after the deed, were on the same scale as before and less than what schedule B authorized. The reasonable inference is, not that there was no charity or endowment completed in point of law, but that the trustee for the time being for reasons which cannot now be ascertained (he being dead) did not think fit to raise the scale to the maximum limit provided for. The next point made was with reference to a passage in the deed relating to the trustee's power of changing the trust property. The passage is not as clear as might be wished but its meaning to my mind is that if any of the items of the immoveable property of the trust is transferred and others substituted, the substitution need not be item for item. Certainly it does not mean that the trustee was at liberty to deprive the trust of the whole or any portion of the trust property at his will and pleasure. The other part of the instrument relied on is the proviso at the end denying to the *public* any vested or other interest in the charities or the properties appertaining thereto or in the management thereof. Now the provisions of the instrument defining the character of the main charities run as follows:—

"As to the said temple of Camacala Cameswara Swami being item No. 1 in the said schedule A mentioned, upon trust that same shall continue to be and to be used for ever as heretofore a

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a Hindu temple or place of public worship of Hindus of the Shiva sect according to the rites, practices, and ceremonies, of Hindus of that sect, and for the performance therein for ever as heretofore of religious ceremonies according to the rites and ceremonies of Hindus of that sect; and to the said chuttram being item No. 2 in the said schedule A mentioned, upon trust that same shall continue to be and to be used for ever as a chuttram for the lodging and feeding of Hindustani Brahmins and Byragees to the intent that Brahmins and Byragees who come from the Deccan (whence the settler's family came as strangers into this country) may each be lodged and fed there free of charge for the space of two days after arrival in this country as provided in item 5 of the said schedule B, and as to the said agrapharam being item No. 3 in the said schedule A, upon trust that same shall continue to be and to be used for ever as an agrapharam or free lodging house for poor Brahmins who attend and worship and read the vedas at the said temple."

These unambiguous declarations are of course utterly inconsistent with the view that there were no trusts in fact whatsoever. Reading these passages and the proviso together, the intention was, apparently, to guard against the charities being treated of as public within the meaning of the Religious Endowment Act (XX of 1863) the provisions of which empower even persons having no direct interest in public institutions to start legal proceedings in their character of mere worshippers, as also within the meaning of section 539 of the Civil Procedure Code, so as to save the trusts and charities from being involved in litigation under either of those provisions, and with a view to make the trusts subject solely to the control provided for by the deed. Even were the constructions I put on the passages relied on not right, they could afford ground for no other argument than that they purport to annex conditions of doubtful validity to trusts otherwise well established. I fail to see how they in any way go to support the view that the document is merely nominal. The same observation applies to the payments to be made to the annuitants and to those to be made towards scholarships in the Presidency College. According to the recitals in the deed, the former owed their origin to an ancestor of Easwara Doss who was not the original founder of the charities. The latter alone were introduced by Easwara Doss. Whether these or either of them would not constitute legitimate disbursements out of the

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trust funds, assuming there were trust funds prior to the deed as is stated therein, is not relevant to the matter under consideration, as they would be in a case where, the trust being admitted, the question is whether the provisions of the deed relating to the abovementioned payments involved an improper diversion of the trust funds; of course the determination of that question will depend upon evidence and considerations not gone into, and which could not have been rightly gone into, at the trial of this case.

I now pass to the other main contention on behalf of the defendant. It was this. At the time of the execution of the document the defendant was young, having only not long before attained his majority, and quite under the influence of his adoptive father. He had no independent advice, and beyond affixing his signature to the document he knew nothing of it, being altogether wanting in intelligence and incapable of understanding the contents of such a complicated instrument, so as to assent to it with that freedom of will and clearness of understanding without which there could be no execution that can bind him. I take it that the defendant is not a man of ability though from the answers given by him to questions put at the trial, I should not conclude that he was as dull witted as he was in the argument represented to be. However this may be, it is quite true that he was when he signed the document only about 20 years of age, inexperienced, and presumably under the influence of Easwara Doss. It is also probable that he did not care to follow and did not follow all the details in the document, but I have no doubt that the note appended to it that the contents were explained by the manager of Messrs. Branson & Branson to the defendant, records what in fact took place, and that the defendant knew perfectly well the substance of the transaction, viz., that it was a formal declaration of trust in regard to the charities, with which for years he must have been familiar, and of the description and extent of the properties belonging thereto as also of the right conferred on him as Dharmakartha which was to devolve after him on his heirs. I believe the evidence of the witnesses to the effect that prior to the execution of the instrument it was well known to the members of the family that Easwara Doss contemplated executing such a deed. And, as the natural father of the defendant who appears to have lived in the family and enjoyed the confidence of Easwara Doss must have known of it, it is not easy to accept the story of complete

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ignorance on the part of the defendant of what was done. Nevertheless, had the execution of the instrument by the defendant involved a transfer of his property to any appreciable extent for the benefit of Easwara Doss or of something which Easwara Doss wished to serve, I should view the transaction with that jealousy with which Courts most properly regard transactions between persons standing in the fiduciary relation of parent and child, whereby an advantage is secured to the former at the expense of the latter, and hold, in accordance with the principle laid down over and over again in the decisions to which the Advocate-General called our attention, that the execution of the instrument took place under circumstances which threw upon the parties claiming under it the *onus* of establishing the good faith of the transaction beyond the shadow of a doubt. But, how can it be said upon the facts here, that the defendant gave away any of his property to his father or even that the latter really obtained any other advantage or benefit such as would bring the case even in the slightest degree within the spirit of the decisions referred to? In making this observation I proceed on the assumption that the recitals as to the origin and history of the trusts and the funds thereof are true. I cannot agree in the suggestion of the Advocate-General that the statements are myths invented by Easwara Doss. Neither the defendant nor Janakiramayya, the gumasta of Easwara Doss, who could not entirely be ignorant of the matter, has ventured to say they are false. Janakiramayya in his evidence added that Easwara Doss was not a man who would make false recitals. The proved facts noticed by me when dealing with the contention that the transaction was nominal tend, so far as they go, to confirm the view that the recitals are true. If it was possible to anybody to disprove the statement that Mukund Lall left two thousand rupees for the purpose of charity, that it had accumulated to Rs. 20,000 in the time of Tekumchand, to a lakh at the death of Kundun Lall and to a lakh and-a-half in 1887, that man was the defendant inasmuch as he was the person in possession of the family papers, documents and accounts. But he has made no attempt to do so. If my views of the facts is correct, it follows that the instrument in question brought about no transfer of the defendant's property to any one, nor did it secure any pecuniary or other similar advantage to Easwara Doss. That Easwara Doss in treating himself as sole trustee in the instrument

was not arrogating to himself what he had no right to is clear from the case in *Purappavanalingam Chetti v. Nullasivan Chetti and others*(1) where Holloway, J., laid down that the custom of the country universally recognises the right of the eldest male heir of a deceased trustee to succeed as trustee to him from whom he inherits. If it be said that the defendant has been deprived of the right of becoming trustee after Easwara Doss it should be remembered that he has been made hereditary Dharmakarthha with emoluments attached.

As the trust properties had considerably increased through the efforts of the successors of the founder, it was but natural that Easwara Doss should have thought it prudent to leave the matter on such a footing as to admit of no question after him. The circumstance that the defendant though in point of law Easwara Doss' son was, as a stranger in blood to the family, not likely to view the charities with that favour with which one born in the family would regard them, may also have suggested to Easwara Doss the advisability of obtaining the assent of the defendant to the document. In short the execution of the instrument, in my judgment, secured no real gain to Easwara Doss nor subjected the defendant to any real loss, but operated merely to safeguard charities and trusts that had long existed, and supplied in regard to them written proof, which at the time of their humble beginnings the founder had not thought fit to provide.

It remains to add that had my conclusion with reference to the contention just above dealt with been different, I should nevertheless, hold that the defendant has precluded himself from impeaching the document.

First, he failed to have it set aside within the period allowed by law to him, viz., three years under article 91 of the Limitation Act. That period must be taken to have elapsed during the lifetime of Easwara Doss itself, as the *facts* entitling the defendant to have the document set aside were within his knowledge from the very date of its execution. Supposing for argument that the presumption of the continuance of undue influence would have prevented the running of time so long as Easwara Doss was alive (a supposition on the face of it absolutely untenable) the defendant should have sued to avoid the instrument within three years from Easwara

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Doss' death. Even this he did not do. The decision of the Judicial Committee in *Janki Kunwar v. Ajit Singh*(1) where also undue influence was one of the grounds on which the objection to the document was raised, is a direct authority against a party to an instrument who has not got it set aside within the three years prescribed, being heard in derogation of the rights created by the unavowed instrument—see also *Jugaldas v. Ambashankar*(2).

Apart from, as it seems to me, the above insuperable bar there are the long delay and laches on the part of the defendant. Though in 1887 he was as a youth under the presumable influence of Easwara Doss, such subjection to the influence cannot in law be taken as having necessarily continued right through to the father's death 13 or 14 years after. In the case of these members of a joint Hindu family such a presumption will in my view generally cease to be operative after the lapse of a reasonable period. If even thereafter, persons entering into transactions while under this sort of influence do not with sufficient diligence seek to get rid of them, the doctrine of acquiescence ought ordinarily be held to apply to them. This being so, the defendant cannot *prima facie* be held to have been under the influence of Easwara Doss all the period the latter survived the execution of the deed; and the defendant having done nothing during that time to repudiate the deed he must in justice to Easwara Doss as well as to the plaintiffs be held precluded from questioning it. For, had he objected to the deed in Easwara Doss' lifetime, the latter could have given due effect to his wishes in regard to the trusts without depending upon the defendant's co-operation in the matter. He could have effected by virtue of the power vested in him as father (*Kandasami v. Dorasami Ayyar*(3)), a partition between himself and the defendant and devoted the whole or whatever portion he pleased of the property falling to his just share for the upkeep of the trusts, even if really created by himself, inclusive of the annuities to the plaintiffs. It is scarcely necessary to say that though the plaintiffs were not relations legally entitled to maintenance from Easwara Doss, yet it is not surprising that one of his wealth and position should have felt it but right to keep these descendants of his

(1) I.L.R., 15 Cal., 58.

(2) I.L.R., 12 Bom., 501.

(3) I.L.R., 2 Mad., 317.

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uncle above actual want. The defendant having lain by till Easwara Doss' death and made it impossible for the plaintiffs to obtain any such provision in their favour from Easwara Doss, in fairness to them, it seems to me, the defendant should not be allowed to deny the right given to them by the deed.

In the view I have taken of the case, it is unnecessary to consider the Hindu Law texts and the decisions thereon, cited by Mr. Narayana Rao, as to a father's power to give away a reasonable portion of family property for purposes of charity, independently of the assent of his sons.

Having come to the conclusion that the defendant is not entitled to impeach the instrument in question as a whole, I must hold that the plaintiffs are entitled to the payment provided for in their favour by it. We are not concerned at present with the question of the right of their descendants and successors to the continuance of the payment.

As regards the arrears, the claim of the plaintiffs for the period prior to Easwara Doss' death must be disallowed. Admittedly, they were in receipt of monies from him, and, in the absence of proof to the contrary, such payments should be taken to have been made in discharge of the obligation created in their favour by the trust deed.

Modifying the decree of the learned Judge I would declare the right of the plaintiffs to the payment in question out of the trust funds, in accordance with, and subject to, the provisions of the document, and award them arrears between the death of Easwara Doss and the date of the plaint.

As to the question which of the immovable properties acquired subsequent to the deed belong to the trusts there can be no doubt that Tinnanoor Jaghir was purchased for the trusts and belongs to the same. I would not however in this suit determine which of the other items of immovable properties in the plaint schedule that do not find a place in schedule A of the trust-deed were purchased for the trusts and appertain thereto. That is a question which I think ought to be determined in a suit where the trusts are adequately represented by a properly appointed trustee.

I would order the defendant to pay the plaintiff's costs before the learned Judge and in appeal, not out of trust funds but personally, and bear his own, likewise.

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SANKARAN NAIR, J.—The plaintiffs sue to enforce their claims under a deed of settlement (exhibit A) executed by the late Easwara Doss and his adopted son, the defendant on the 28th January 1887. Easwara Doss died in 1900. The main question for decision is whether this is valid, and enforceable against the defendant. The instrument purported to vest all the properties in schedule A in a trustee who is to pay the income thereof, with certain exceptions, to a person called the Mooktear or Dharmakarta, who is to apply it:—

- (1) in performance of the charities in schedule B,
- (2) in payment of the annuities in schedule C, and
- (3) who is to account to the trustee.

There are two exceptions.

For the Tiruvallur charity the payment was to be made by the trustee to Roop Lall, the plaintiff, and if the annuitants in C desired it, the trustee is empowered to pay them without the intervention of the Mooktear.

The annuities in C as they fall in are to be paid to the Mooktear for the time being.

The surplus is to accumulate and form a sinking fund for any extra expenditure that may be required for the upkeep of the property in schedule A and for the marriage expenses of the children of the Mooktear provided such Mooktear be a descendant of the defendant, his cousin Bala Pershad, the son of Easwara Doss' sister or the plaintiff's father, Muni Lall. The balance of the sinking fund is not disposed of in any way. It accumulates. The surplus that may become available in certain contingencies out of the income devoted to the purposes in B and C may be spent according to the discretion of the trustee for any charitable purpose not herein provided for, and any balance is to be added to the sinking fund.

The nucleus of the property in A is recited to consist of a sum of two thousand rupees left by Raja Mukund Lall, the grandfather of Easwara Doss, which, in the hands of his eldest son Raja Teekumchand increased to twenty thousand at the time of his death, who left it to his brother Kundun Lall, according to the recitals in A, with directions to invest the same and spend half the income in charity. In Kundun Lall's hands it swelled to over a lakh of rupees and Easwara Doss, the adoptive father of the defendant, has increased the family fortune to more

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than what is included in schedule A, which itself is more than two lakh of rupees.

Of the charities in B the more important so far as the estate is concerned are a temple, chuttram and agraharam. The temple was built by Kundun Lall,—at any rate he began its construction. The chuttram and agraharam were constructed by Easwara Doss. Worship was carried on in the temple. Deccani Brahmin travellers were fed in the chuttram and the agraharam was intended for the lodging of the Brahmins who read the vedas in the temple. There was however no trustee and no endowment and no specific income set apart. Easwara Doss treated the money spent on it as part of his family expenditure and it was so treated in his accounts. For the above charities are set apart Rs. 600, 1,500, 180, respectively, two thousand two hundred and eighty in all, out of the total income of three thousand two hundred and eighty-five set apart for all the charities in B.

Of the balance, Rs. 360 per year go for two scholarships to students in the Presidency College and various small sums for the performance of certain annual ceremonies which, it is stated, were till then being performed at the expense of Easwara Doss.

The annuities with the exception of those to the defendant and his children are payable to certain relatives who have no legal claims on the estate.

The plaintiffs are some of the annuitants, who, as the descendants of an illegitimate son, have no claim to maintenance. The annuity is clearly only charitable in its nature.

The properties in A must, therefore, be treated as belonging solely to Easwara Doss and the defendant without being charged even for the upkeep of the charities in B or the maintenance of the relatives in C, with the exception of the defendant's children, though, in my opinion, it would make no difference in the decision of this appeal if they were so charged.

It is in terms declared that these shall be considered purely private charities and that the public shall never at any time have any interest therein or in any charity property. The result is that being a private trust it may be put an end to and misfeasance or malfeasance may be condoned.

These facts have an important bearing on the nature and validity of the instrument in question.

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That the transaction was not intended to be merely nominal and that Easwara Doss intended to create a trust, seems clear.

In fact all the evidence points to that conclusion. He has been carrying on the worship in the temple, feeding his castemen from his country in the chuttram, and maintaining the agra-haram. He would naturally desire to see these charities continued and carried out. He had not sufficient confidence in his son. The learned Judge who saw defendant in the witness-box calls him dull witted and the evidence of the schoolmaster supports that view. Easwara Doss himself was leaving for Benares and like a good Hindu which, no doubt, he was, he naturally would desire to settle all his affairs before leaving Madras. The annuitants are his poor relations and others whom he was helping and for whom he may be expected to make some provision after his death. Finally a will executed by him places the matter beyond all doubt. By that Will he appointed, in exercise of the power conferred upon him by the settlement deed, the Official Trustee of Madras to succeed him as trustee. This seems conclusive to show his intention that these charities were to be carried out and the annuities continued after his death.

When the evidence is clear that the instrument was to operate at any rate after death, there is no doubt a strong presumption that the trust was to be enforceable from its date. But the terms of the instrument and the evidence lead me to a different conclusion. Easwara Doss, the first trustee, takes the power "to alter the present investment of the trust funds by addition to the property in the schedule A set forth or by substituting other property for all or any of the parcels in the said schedule A mentioned and excluding or withdrawing any of the said parcels in the said schedule A mentioned and all property so excluded or withdrawn shall cease to be trust property subject to the trust hereof or be in any manner whatsoever affected by anything herein contained whether any property be expressly or in fact substituted for the same or not."

I have anxiously tried to place some construction on this provision which would not defeat the trust. But I find myself unable to do so. The power of substitution at first sight appears extraordinary as it would authorise an alienation under an ostensible pretence of a substitution, though never really intended, and the later provision that substitution is unnecessary

seems irreconcilable with any view other than it conferred absolute power on Easwara Doss not to create the trust so far as any or all these properties are concerned. He was fully aware that such power was not needed in the interests of the trust as it was not given to his successors, who had neither any power of substitution nor of withdrawal. It is no doubt possible to suggest that the trust having been created, any provision inconsistent with it may be treated as null and void. But I have to read the instrument as a whole, and take the words as I find them. If the meaning is clear, effect if possible has to be given to the intention expressed. Easwara Doss had some motive in reserving to himself such power. The substantial portion of the property in A was subject to the vicissitudes of the salt trade carried on by his partner. That amount was to be invested in trust "when he may think fit so to do and according to his own absolute discretion." Evidently then no means existed under the instrument of compelling the appropriation of that money to the trust, and it is also possible that it may not be available at his death. Nor was this intended as a mere illusory provision. He has sold item No. 5 in A—a valuable property. Item No. 9 another valuable property has disappeared. This provision, which was acted upon, inclines me to think that Easwara Doss wanted an enforceable trust to be created and in operation only from the date of his death and not before and accordingly he reserved full freedom as owner in dealing with these in his lifetime. The evidence in the case strongly supports this view. The result of that evidence is thus stated by the learned Judge. "No alteration was made in his way of dealing with his properties or the maintenance of the plaintiffs and others. No property was in fact set aside for charity. No fresh books were opened, and affairs continued to be conducted just as if no deed had ever been executed up to the time of his death. He paid who he liked and what he liked. He sold property and bought property; and in spite of the provision in the deed that Byragees and Brahmins should be fed for two days, he first stopped feeding them for a time and then he fed them for one day only." I have only to add that what he spent on charities and paid to his relatives was far below the sums specified in B and C schedules, and there is, further, evidence in the case, that these expenses were defrayed or annuities received not on account of any trust. The plaintiff when examined as a

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witness in Original Suit No. 213 of 1900 in connection with this very matter said, that he learnt the particulars of the trust deed only after the death of Easwara Doss and added "I know that charities were conducted as per trust deed only when I saw the trust deed recently" and he was the man who was to conduct the Tiruvallur charity under A. If the plaintiff, in whom Easwara Doss seems to have placed more confidence than in any other relative, did not know this, it may be assumed that those connected with the other charities in B are not likely to know anything. Then as to his annuity the plaintiff says "He did not tell me what he left for me. He never gave me anything as entitled to under the trust deed." He tried in the present suit to minimize, in my opinion unsuccessfully, the effects of his previous statement. Other circumstances fully bear out the inference from the evidence that Easwara Doss kept others in the dark as to the provisions in A. The transaction was apparently carried out in secret. The only attesting witnesses were the two solicitors of the father. The person who is stated in the instrument to have explained it to the defendant was the manager of their office. Under ordinary circumstances the plaintiff's natural father would have been an attesting witness. One of the father's solicitors under a special power of attorney from both father and son got the document registered after Easwara Doss and his relatives left for Benares.

That Easwara Doss did not intend that the trust should come into existence during his lifetime seems also to be borne out by the fact that he did not carry out the trust in favour of the Presidency College, and the plaintiff's evidence that Easwara Doss told him at the time of execution of A "During my lifetime I have been helping you and I write for the same business to continue *after* me" and "Rs. 35 will be paid every month regularly *after* his death" is significant and shows Easwara Doss' own view of the effect of the instrument. If he had intended to create an obligation binding on himself I find it difficult to believe that he would have so utterly neglected his duty. My conclusion is that Easwara Doss intended these arrangements to come into force only after his death and he never intended to or created any trust enforceable in his lifetime. The plaintiff, a volunteer, cannot now enforce it against the defendant.

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Exhibits E and F are consistent with this view. He did not take them in his capacity of "trustee" in whom the properties are vested by A as distinct from Mooktear or Dharmakarthas, but as the Dharmakarthas of the temple, only one of the charities in B. He did not consider himself a trustee then; but no doubt intended them to form trust property after his death. The evidence is that he utilized the income indifferently for his private or charity use.

The instrument is, in my opinion, also void for uncertainty of the subject of the trust. Easwara Doss had power to withdraw any property, or to alienate, and only such properties as should remain at his death, or as he should not have sold or disposed of, were to be trust property. The properties were to be ascertained and appropriated to the trust only at his death.

As to item No. 10, a lakh and fifty thousand out of the four lakhs in Government promissory notes in the name of Kalika Doss invested in salt trade carried on by a partner, there was only a voluntary executory trust, and there is nothing to show that this sum was even converted into trust property. There is not even a covenant by the defendant to invest on trust, in case of failure by his father to do so. The purchase of Tinnalore Estate in the name of Easwara Doss, as a Dharmakartha of the temple, will not by itself make it temple property—see *Maharanees Brojsoondery Debia v. Ranees Luchmee Koonwaree and others*(1)—Privy Council. It is the property of the person who advanced the money. In any event it cannot be the subject of this trust as all such properties are vested in a trustee for the benefit of all the charities of which the temple is only one. And as all the incumbrances on the estate which formed the consideration for the sale were family property, there is the insuperable difficulty of the absence of the defendant's consent. The rest of the properties in the plaint schedule B were not even purchased in his name as Dharmakarthas. It has not been shown that these were constituted trust property or that the defendant's consent was ever obtained for such appropriation.

I proceed to consider the next point argued before us. At the time of the execution of the instrument, the defendant, his adoptive father, and the two unmarried daughters of the former were the only persons who had any interest in the properties

(1) 15 B.L.R., 176 (foot-note).

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therein referred to. The defendant was deprived of his undivided moiety of the properties in A and of his right to take the other moiety by survivorship on his father's death, a right of which he could be deprived only by the father entering into a partition and giving up in his lifetime possession of one-half of all the family properties to his son. He sacrificed the interests of his possible male issue and the interests of his daughters and their descendants.

The properties in A are of considerable value. Item No. 10 alone being one lakh and fifty thousand rupees. According to the plaintiffs (see paragraph 6 of the plaint) a lakh and fifty thousand rupees in addition to the above have to be invested for the benefit of the trust. The benefits he derives is only a monthly payment to himself of Rs. 35 only for life, Rs. 20 to each of his children only for their lives—an utterly inadequate consideration.

On the other hand what was the father's position? From being the managing member of a Hindu family and the owner of a moiety, he became a sole trustee, with practically no control over him. It (A) gave him the right of nominating his successor, a sufficient check on the defendant going against his wishes—a right which he exercised the same day by appointing the Official Trustee to the exclusion of the son. He acquired the right, without even the power of veto given to the son, of substituting other properties, or of entirely withdrawing any properties in A without any such substitution when they shall cease to be trust property, with the result, that he gets power of complete alienation. Under pretence of conversion or substitution, he is also thereby enabled to put an end to the trust in whole or in part while no such power is reserved to the defendant if he succeeds or to any other trustee. He reserves to himself the power to vary from time to time the terms in B as to the mode in which the charities are to be conducted while it is expressly declared that his successors are to have no such powers. The investment of a lakh and fifty thousand is at his own absolute discretion. I fail to see that he has lost, in fact, any power of control over these properties he had before; he has certainly acquired more extensive powers, while the defendant, his adopted son, the owner of half the property, is converted into an annuitant on his own estate. This adopted son was under his control and reposed full and active confidence in him. That son

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was not conversant with business. He had no adviser of his own to warn him against the imprudent nature of the transaction or, if he had, there is no evidence that he consulted or had the opportunity to consult any, free from his father's interference. Such evidence, would, if available, have been forthcoming, as the plaintiff was on familiar terms with the deceased. His natural father was alive and was probably a competent adviser. But there is no evidence in this case whether he was aware of the nature of the transaction. The inference is, as I have already pointed out, he was kept in the dark. This is not a family arrangement under which the defendant as a member would be benefited and where a father's influence may be legitimately and beneficially exercised. But it is a transaction which, in the form of a trust, divests the son of all his interest in the property, and vests the ownership completely in the father with powers which leave him unfettered to deal with such property. Its validity must be tested by the same rules which are applied by English Courts of Equity to transactions between persons, one of whom deriving material benefits stands in confidential relation to the other.

It appears to me that the father, and the same rule is applicable to a volunteer claiming under the father, with notice of the fact that active confidence was reposed in the latter, was bound to prove not only that his adopted son understood the terms of the instrument—and they are not clear in many respects) and that he knew how it would affect him—but that he was in a position to, and did form, an independent opinion on the matter. I do not suggest that he must be proved to know all the various provisions set out in A, but there must be some evidence to show, among other things, that he was aware of the sacrifice he was making, that his father was to be a practically uncontrolled trustee, and he may not even be one.

It is possible, though I think it is not likely, that he was willing to give up his property. But there must be clear evidence that it was a choice accepted by him of his own free and independent will, unbiassed by his father's influence, and with full knowledge.

It was argued that the father took the property as trustee and that therefore there is no reason to apply the rule of English law or view the transaction with any suspicion. I have no hesitation in rejecting this argument. The Courts interfere to protect the

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defendant not because the father derives any advantage, or that the son is legally incapable of contracting, but on the ground that he is not presumed to be a free agent capable of forming an independent judgment so long as he is subject to parental influence. It does not accordingly matter whether the same be exercised to the benefit of the parent himself or other persons. It may be easier for him to rebut the presumption of the exercise of his parental influence when he derives no personal benefit. In *Allcard v. Skinner*(1) the defendant was only a trustee for an Association in which both the plaintiff and the defendant were interested. She derived no personal benefit. The deed executed under parental influence in *Turner v. Collins*(2) gave the property to the father's second wife and daughter. In the case before us, however, I have already expressed my opinion that the instrument is very much to the advantage of the father. It is unnecessary therefore to pursue the matter further. As to the defendant's knowledge, we have his evidence that he was not aware of the contents of A, and never understood its nature, and effect, and, on the other hand, there is the evidence of the instrument itself that the manager of his father's solicitor's office explained it to him. What the explanation was it is now impossible to say. Reading the document to him would, of course, be useless. I accept his evidence to this extent that he did not know that he was parting with a substantial portion of his property and that he never intended to part with his rights to such valuable property. But it is now difficult to rely upon his memory to ascertain what passed so many years ago. It is possible he may have been told something about making arrangements as to carrying on the worship of the temple, or the payment of something to the dependents, but there is no evidence about it. I have already referred to the suspicious secrecy about the execution of the instrument. Why if secrecy was not intended such persons as Easwara Doss and Messrs. Branson & Branson failed to secure the defendant's natural father as an attesting witness requires satisfactory explanation. I am inclined to think that he, clearly, was kept in the dark. It is possible that Roop Lall may have been told that a document will be executed making some provision for him, but I have already given my reasons for holding that he did not know of the contents

(1) L.R., 36 Ch.D., 145.

(2) L.R., 7 Ch.A.C., 329.

of A, of the amount payable to himself on his own account, or for the Tiruvallur festival.

The plaintiff thus has not discharged the burden of proof.

If, however, we are to believe that the manager explained the transaction to the defendant or what is more likely that Easwara Doss or somebody else gave him some general idea that some provision is to be made for the carrying out of the family charities as heretofore, then there is evidence in my opinion of the improper exercise of parental influence.

The wish of the great grandfather and grandfather in favour of charity, if conveyed to him either through the instrument or any other means is calculated to exercise an almost irresistible moral pressure on a young man then leaving on the pilgrimage to Benares, certainly, far stronger, when we consider the dictates of his religion and the conditions of Hindu family life, than the posthumous pressure exercised by the memorandum of the deceased father in *Powell v. Powell*(1) which the Court treated as "most obnoxious to the rule of the Court."

The recitals that the properties in A have hitherto been treated by the family as charity property, that the charities in B have been hitherto carried on, that the annuities in C have been paid in pursuance of the directions of their ancestor, were certain at that time to compel his assent to the execution of A, yet these statements are made without strict regard to truth. There never was any charity in favour of the Presidency College, and the subsequent conduct of Easwara Doss shows that he did not intend to carry this out. Some of the others, it is true, were performed by him but at a cost far below than what is set apart by schedule B. The benefits till then conferred on the relatives are far below what is given to them by schedule C. These recitals are undoubtedly misleading. If Easwara Doss was really anxious in his old age to devote such valuable property to charity, it is clear that he was not a safe adviser and was bound to see that his son had independent advice and was fully informed of his legal right to disregard his ancestors' wishes, if any, and also of the fact that a portion of these properties would have sufficed for the performance of the charities as heretofore.

(1) L.R., (1909), 1 Ch.D., 243.

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I am, therefore, of opinion that the defendant signed exhibit A at the request of his adoptive father without knowing what he was about, that he never intended to give up his property, and that the paternal influence was exercised against his interests.

I would dismiss the appeal and the memorandum of objections but without costs.

The Offg. C.J.—I am unable to agree with Mr. Read that section 575 of the Code of Civil Procedure governs the present case. The grounds on which *Sabhapathi Chetti v. Narayanasami Chetti*(1) proceeds, apply here, and *Lachman Singh v. Ram Lagan Singh*(2) is a direct authority in favour of the view that the decision of the Senior Judge prevails in a case such as this.

The decree of Boddam, J., will be modified to the effect stated in my judgment.

SANKARAN NAIR, J.—I agree.

Messrs. *Bransn & Branson*—attorneys, for respondent.

APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Offg. Chief Justice, and
Mr. Justice Boddam.*

KAKARLA ABBAYYA (PLAINTIFF), APPELLANT,

v.

RAJA VENKATA PAPAYYA RAO (DEFENDANT),

RESPONDENT. *

*Ryot, right of, to trees—Civil Procedure Code—Act XIV of 1882, s. 584—Power of
Court on second appeal to examine evidence of usage—Custom.*

A ryot holding lands in a zamindari on a permanent tenure would, as regards land on which a money assessment is paid, be *primâ facie* entitled exclusively to the trees thereon. Where the crops are shared between the ryot and zamindar, they will be jointly interested in such trees, but such presumptions may be rebutted by proof of usage or contract to the contrary.

Narayana Ayyangar v. Orr, (I.L.R., 26 Mad., 252), followed.

(1) I.L.R., 25 Mad., 555.

(2) I.L.R., 26 All., 10.

* Second Appeal No. 1044 of 1902, presented against the decree of J. H. Munro, Esq., District Judge of Kistna at Masulipatam, in Appeal Suit No. 921 of 1901, presented against the decree of M.R.Ry. T. Kristnaswami Naidu, District Munsif of Bezvada, in Original Suit No. 83 of 1900.

Although the provisions of section 584 of the Code of Civil Procedure disallow a second appeal with reference to findings of fact, yet, the existence or non-existence of a usage having the force of law is unaffected by such disallowance. Consequently, it is the duty of the Court, when it has to pronounce an opinion upon such question to examine the evidence bearing on it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it.

Custom in India is transcendent law.

A custom cannot be established by a few instances or by instances of recent date.

Observations on the nature of evidence necessary to support custom.

Eranjoli Vishnu Nambudri v. Eranjoli Krishnan Nambudri, (I.L.R., 7 Mad., 3), all owed.

Hurry Churn Dass v. Nimai Chand Keyal, (I.L.R., 10 Calc., 138), not followed.

Bai Shrinbai v. Kharshedji, (I.L.R., 22 Bom., 430), not followed.

SUIT to establish the plaintiff's right to trees on his lands. The defendant was a zamindar and the plaintiff was his tenant with rights of occupancy.

Both the lower Courts dismissed the plaintiff's suit.

The plaintiff preferred this second appeal.

V. Krishnaswami Ayyar and *K. Subrahmania Sastri* for appellant.

T. Rangachariar for Sir *V. Bhashyam Ayyangar*, the Hon. Mr. *P. S. Sivaswami Ayyar*, and *P. Nagabhushanam* for respondent.

JUDGMENT.—The principles with reference to the rights of a tenant holding on a permanent tenure lands in zamindaries, have been elaborately considered in *Narayana Ayyangar v. Orr*(1) which was decided after this case was disposed of in the lower Court. The previous decisions of this Court in *Appa Rau v. Ratnam*(2) and in *Appa Rau v. Narasanna*(3) relied on by the Acting District Judge are referred to and explained in the above recent decision. According to it, a ryot holding lands in a zamindari on a permanent tenure would, as regards land on which money assessment is paid, be *primâ facie* entitled to the trees therein exclusively. In regard to lands as to which the sharing of crops between the zamindar and ryot prevails, the zamindar and the ryot would be jointly interested in the trees standing thereon, but presumptions to the above effect are liable to be rebutted by proof of usage or contract to the contrary. In the present case the

(1) I.L.R., 26 Mad., 252.

(2) I.L.R., 13 Mad., 240.

(3) I.L.R., 15 Mad., 47 at p. 49.

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zamindar pleaded that he had been customarily enjoying the trees in his zamindari even though standing on lands held by ryots, and evidence as to such enjoyment was offered, but no issue was raised as to the custom of the zamindari, and the judgments of the lower Courts do not discuss the matter with reference to the custom alleged. Considering the importance of this question as bearing upon disputes between the zamindar and his ryots generally, we think there ought to be a direct and distinct finding upon the matter. It should be added that, even in the absence of a custom, it may be shown with reference to the trees on the plaintiff's holding that he has no right to them under contract, if any, between him and the zamindar. We must therefore call upon the District Judge for a finding upon the question whether the defendant—the zamindar—is entitled to the trees in dispute, either by virtue of a custom of the zamindari, or contract between the parties.

“Fresh evidence may be taken, and the District Judge may call for evidence oral or documentary for the purpose of elucidating the question of custom apart from any evidence which the parties may adduce.

“The findings should be submitted within three months from this date. Seven days will be allowed for filing objections.”

[The District Judge, on remand, took further evidence and found that there was no contract regarding the right to the trees, and that the evidence failed to establish a customary right in the trees in the defendant.]

JUDGMENT.—The question for determination is as to the alleged right stated to be founded on local custom, of the respondent, the zamindar, to trees on land held by persons on the usual permanent ryotwary tenure in his zamindari of Mylavaram in the Kistna district. The finding of the District Judge is that no such custom as that set up has been established.

The preliminary point which has been raised is, whether it is competent for us to examine the evidence with reference to which the finding of the District Judge was given, the matter being before us on second appeal.

Mr. Krishnaswami Ayyar for the appellant contended, that the finding, though one as to an alleged local custom, is still a finding as to a matter of fact, and consequently, it was binding upon us and not liable to be revised by us with reference to the

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weight to be given to the evidence adduced. The cases relied on by him, viz., *Hurechur Mookerjee v. Judoonath Ghose*(1), *Syud Ali v. Gopal Dass*(2), *Hurry Churn Dass v. Nimai Chand Keyal*(3), *Bai Shirinbai v. Kharshedji*(4), and *Subraya Poi and others v. Appu Bhandary and others*(5) decided by this Court, support his contention, but they are not reconcilable with the decisions of this Court in *Hanumantamma v. Rami Reddi*(6), *Mirabivi v. Vellayamma*(7) and *Eranjoli Vishnu Nambudri v. Eranjoli Krishnan Nambudri*(8), the last of which was decided by a Full Bench. In these three cases, the learned Judges who took part in them went into, and discussed the evidence, and arrived, as the result of such examination, at conclusions in regard to the usages then in question, in second appeal. No doubt in doing so, the competency of the Court so to examine the evidence and decide with reference to its weight, was merely assumed. In our opinion that cannot be taken as detracting in the slightest degree from the authority of those decisions in reference to the present point, for it is impossible to believe that the learned Judges who decided them overlooked so obvious an objection, as it must have been, if Mr. Krishnaswami Ayyar's contention were right. It seems to us also that were the question *res integra* we cannot but hold that the contention is untenable. The decisions opposed to our view would have been correct, had the provision of the Civil Procedure Code conferring the right of second appeal not contained the clause “or usage having the force of law”; for then, the words “the decree being contrary to law” by implication would exclude an appeal on the ground that any question or questions of fact raised in the case, and affecting its decision, was or were wrongly determined by the lower Courts, and, in such a state of things, it might have been arguable that a finding by the lower Courts as to the existence or non-existence of a local or special usage, which had to be proved by evidence, was a finding as to a matter of fact, on the analogy of the view held in England that such matters are for the jury and not for the Judge. But the presence in section 584 of the Code of Civil Procedure “or usage having the force of law” makes such an argument irrelevant. This language is so explicit as to

(1) 10 W.R., 153.

(3) I.L.R., 10 Calc., 138.

(5) S.A. No. 773 of 1881 (unreported).

(7) I.L.R., 8 Mad., 464.

(2) 13 W.R., 421.

(4) I.L.R., 22 Bom., 430 at p. 433.

(6) I.L.R., 4 Mad., 272.

(8) I.L.R., 7 Mad., 8.

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render superfluous the seeking for the reason of the provision though that is not difficult to discover, viz., that a usage of the kind mentioned, being in its nature such as must necessarily affect not only parties to the particular litigation and their privies, but whole bodies of people, stands on a footing similar to a matter of law derived from other sources than usage. The very limited scope which is allowed to usages in England, due to special historical causes (see Pollock and Maitland's 'History of English Law,' 1st Edition, Vol. I, p. 163), accounts for questions as to their existence being treated as falling under the category of questions for the jury. Of course it is otherwise in this country where from the days of Manu it has been laid down that "custom is transcendent law." It is clear, therefore, both upon authority which is binding upon us as the opinion of a Full Bench, and as the right interpretation of the provision in question of section 584 of the Civil Procedure Code, that, though the section disallows a second appeal with reference to findings of fact, yet, the existence or non-existence of a usage having the force of law is unaffected by such disallowance. Consequently, it is the duty of this Court, when it has to pronounce upon that question, to examine the evidence bearing upon it, not only as to the sufficiency thereof to establish all the elements (antiquity, uniformity, etc.) required to constitute a valid usage having the force of law, but also the credibility of the evidence relied on and the weight due to it.

Accordingly we heard Mr. Rangachariar upon the evidence in support of the alleged usage. [And after discussing the evidence their Lordships continued.]

We therefore agree in the conclusion of the District Judge and, accepting his finding, we must allow the appeal and, reversing the decrees of the lower Courts, grant the declaration prayed for with costs throughout.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.

SRI RAJA SIMHADRI APPA RAO (PLAINTIFF),
APPELLANT,

v.

PRATTIPATI RAMAYYA AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1905.
July 14, 27.

Misjoinder of parties and causes of action—No misjoinder where one relief merely ancillary—Landlord and tenant—Rights and liabilities of joint lessors and lessors who are tenants in common—Transfer of Property Act IV of 1882, ss. 37 and 109.

A suit is bad for misjoinder where there is a joinder of two causes of action, in each of which, all the defendants are not interested. Where, however, there is really only one cause of action against some defendants, and the relief claimed against the other defendants is only ancillary to the relief to be given to the plaintiff in respect of such cause of action, the suit is not bad for misjoinder.

Saminada Pillay v. Subba Reddiar, (I.L.R., 1 Mad., 333), distinguished.

Per Sir S. SUBRAHMANIA AYYAR, Offg. C.J.—A tenant in common may have ejectment to the extent of his interest, on proper notice to quit; and the inclusion in such a suit of the other co-sharers, as defendants, is merely the inclusion of persons properly parties to the proceeding and not of litigants against whom a separate claim, having no connection with the ejectment, is made.

Per SANKARAN NAIR, J.—The distinction between the law in England and India as to the rights and liabilities of joint lessors and lessees discussed and explained; as also the rights of lessors who are tenants in common.

Case law, English and Indian, on the subject, considered. Where the relation is created by contract with several joint landlords, according to the English cases, such relation subsists only so long as all of them wish it to continue, while according to the Indian cases it subsists until all of them agree to put an end to it; and such a contract cannot, in the absence of special circumstances, be put an end to by any one of them if they continue to hold as joint tenants. This principle, however, will not apply when the suit is for ejectment and partition and all the co-owners are made parties.

The principles embodied in sections 37 and 109 of the Transfer of Property Act ought to be applied in such cases, though they are not expressly declared applicable.

* Second Appeals Nos. 406 and 407 of 1903, presented against the decrees of J. H. Robertson, Esq., District Judge of Kistna, in Appeal Suits Nos. 531 and 550 of 1902, presented against the decree of M.R. Ry. I. L. Narayana Row Subordinate Judge of Kistna, in Original Suit No. 34 of 1901.

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When the lessor recognises the right of another in the premises demised, all the obligations of the lessee, as to payment of rent and surrender of possession, must, if such obligations be severable, and the lessee will not be prejudiced by such severance, be performed by the lessee between the lessor and such other, in such proportions as may be settled by all the parties concerned, including the lessee. If the matter has to be decided by suit, the lessor, lessee and such other person will be necessary parties.

SUIT by the plaintiff to recover from defendants Nos. 1 and 2, 13 acres 84 cents of land out of 23 acres leased to them as tenants from year to year. Subsequent to the lease, the third defendant brought a suit against the plaintiff to establish his right to the lands leased, and the suit terminated in a compromise decree passed on appeal, by which the third defendant's right to 9 acres 16 cents was recognised. Prior to the compromise, the plaintiff had determined the tenancy of defendants Nos. 1 and 2 by notice. The fourth defendant purchased the rights of the third defendant in the lands.

The plaintiff prayed for a partition of the 23 acres and possession of the 13 acres which should be allotted to his share on such partition, by ejecting defendants Nos. 1 and 2.

The Subordinate Judge held that the suit was bad for misjoinder and passed a decree for partition between the plaintiff and defendants Nos. 3 and 4 dismissing the claim against defendants Nos. 1 and 2.

This decree was confirmed on appeal.

The plaintiff preferred this second appeal.

K. N. Ayya for appellant.

S. Gopalaswami Ayyangar for first, second and fourth respondents.

JUDGMENT.—In Second Appeal No. 406 of 1903.—Sir S. SUBRAHMANIA AYYAR, Offg. C.J.—The defendants Nos. 1 and 2 were let into possession of 23 acres of land in the plaintiff's zemindari as tenants from year to year. Subsequent to the creation of this tenancy the third defendant set up a claim to the whole land under a previous transaction between the plaintiff and that defendant's father. In a suit which ensued in consequence, there was a compromise decree, according to which, the third defendant was declared entitled to the possession and enjoyment of 9 acres 16 cents and the plaintiff to the remainder. Pending the litigation, and before the compromise, notice to quit was given in respect of the whole of the lands by the plaintiff to the defendants Nos. 1 and 2. With reference to these allegations, the plaintiff prays for

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a decree ejecting defendants Nos. 1 and 2 from his share of the lands, viz., 13 acres 84 cents excluding 9 acres 16 cents due to the third defendant, and his transferee the fourth defendant, by actually separating the same in this suit in case it is not done earlier in execution of the razinama decree.

The lower Courts directed a partition by metes and bounds of the land between defendants Nos. 3 and 4 on the one hand and the plaintiff on the other, and dismissed the claim against defendants Nos. 1 and 2 on the ground that it involved a misjoinder of causes of action. The question is whether this dismissal is right. The case of *Saminada Pillai v. Subba Reddiar*(1) on which much reliance was placed on behalf of defendants Nos. 1 and 2 is clearly distinguishable. There, certain members of a *Joint Hindu family* sued their co-parceners for a partition and combined with it a further claim to eject tenants who held the land under the family. There was thus a joinder of two causes of action, in each of which, all the defendants were not interested. Such, however, is not the case here. There being already an executable decree for partition between the plaintiff and the third defendant, the actual division as between them is a matter for execution of the decree, and no longer a cause of action for a suit. The present suit cannot, therefore, be rightly viewed as combining one cause of action against defendants Nos. 3 and 4 in which defendants Nos. 1 and 2 have no interest with another to eject the latter in which defendants Nos. 3 and 4 are likewise uninterested. As admittedly, an actual division of the share of the third defendant in execution, and delivery of it to him have not been effected, and as such division is essential to the ejectment of defendants Nos. 1 and 2, which is the relief to which the plaintiff is entitled, assuming his case to be otherwise well founded, it follows that the inclusion of the third and fourth defendants in this suit is merely as that of persons properly parties to the proceeding in the circumstances of the case, and not as litigants against whom a separate claim having no necessary connection with the ejectment of defendants Nos. 1 and 2 is made. The error of the lower Courts was in failing to perceive that the actual division was merely ancillary to the relief to be given to the plaintiff in respect of the only cause of action involved in the suit, and in treating it as if it were a relief to be

(1) I.L.R., 1 Mad., 322.

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granted in a perfectly independent claim for partition as between the plaintiff and defendants Nos. 3 and 4.

In the view I take of the case, the dismissal complained of must be held to be wrong, inasmuch as the plaintiff will be entitled to eject defendants Nos. 1 and 2 from his portion of the lands on his showing that the tenancy as between him and those defendants has been duly determined. For, the effect of the compromise decree was to make the plaintiff and third defendant tenants-in-common so long as the 23 acres of land remained undivided; and it is settled, that a *tenant-in-common* may have ejectment to the extent of his interest on proper notice to quit. See *Cutting v. Derby*(1) and *Doe.d on the demise of David Whyman and another v. Chaplin*(2).

The decrees of the lower Courts, therefore, in so far as they are against the appellant must, I think, be set aside, and the suit remanded to the Court of First Instance for disposal on the merits. The costs will abide and follow the result.

SANKARAN NAIR, J.—According to the English cases where there is a joint lease by joint tenants, any one of them may determine the tenancy so far as he is concerned. They proceed on the ground that, though the lease may have been granted by all, yet, in law, each leases only his own share or portion of the entire estate as he is interested only to the extent of his share though the property is undivided, and he can, therefore, put an end to the tenancy created by him even without the concurrence of the others, as it cannot depend upon another when such tenancy is to be determined (*Doe.d on the demise of David Whyman v. Chaplin*(2)).

In that case three out of the four joint tenants who alone gave notice determining the tenancy, were held entitled to recover three-fourths of the estate. The remaining trustee, it was found, had disapproved of the notice, and it was not necessary to decide anything as to the fourth share as the Court was only granting a new trial.

The full effect of such notice was considered in a subsequent case, and it was then decided that, though upon a joint lease by joint tenants, each in law leases only his own share according to the case above cited, yet any one of the joint tenants may

(1) 1776, 2 W. Bl., 1077.

(2) 3 Taunton, 119, 120.

determine the entire tenancy on behalf of all, even though not authorized by the rest, and the lessee has accordingly to surrender possession not only of the share of the joint tenant who gives the notice but of the entire property. The reason is stated to be "that the tenant holds of each the share of each so long as he and each shall please, but that he holds the *whole* of *all* so long as he and *all* shall please." If the tenant is compelled to surrender only a portion, it might be a hardship on him as he might not be willing to continue to hold the rest; and if, therefore, he is to have the right of treating the tenancy as to the whole estate determined on such notice, the same right must be recognised to subsist in the other joint tenants. *Doe.d Aslin v. Summersett*(1). That was an action on the joint demise of James Aslin and John Finch who were executors and joint devisees under a will. The notice to quit was signed by John Finch only, on behalf of himself, and the rest, and it was held that such notice determined the tenancy as to both. This was followed in *Doe.d Kindersley v. Hughes*(2) and *Alford v. Vickery*(3).

Where the lessors are tenants in common the same principle would seem to apply and any one of them may determine the tenancy as to the others also. See Woodfall's 'Landlord and Tenant,' p. 369, Cole on 'Ejectment,' p. 44 and *Ebrahim Pir Mahomed v. Cursetje Sorabji de citre*(4) where the English law was applied on the original side to a suit to which a Hindu, a Mahomedan and a Parsi, were parties.

It has also been decided that one tenant in common has a right to recover possession of his undivided moiety without the other tenant in common. He will then be in possession with the lessee of the other moiety. See *Cutting v. Derby*(5), and the cases cited in note (U) to that case. Thus, according to the English decisions, the Subordinate Judge is wrong in holding that the plaintiff, as a joint tenant or tenant-in-common, is not entitled to eject defendants Nos. 1 and 2 from his share of the property on the ground that he and the fourth defendant have respectively an undivided right, as he puts it, in every inch of the whole plot. But his view seems to derive considerable support from the Indian decisions.

(1) 1 B. & Ad., 135.

(3) 1 C. & M., 283.

(5) 1776, 2 W. Bl., 1077.

(2) 7 M. & W., 141.

(4) I.L.R., 11 Bom., 644.

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The difference is referred to in the case in *Alford v. Vickery*(1) where the Judge had to apply the English law.

The Calcutta and the Bombay High Courts hold that, where a tenant has been put into possession of property on behalf of all the sharers he may not be turned out except with the consent of all: *Krishnarav Jahagirdar v. Govind Trimbak*(2), *Balaji Bhikaji Pinge v. Gopal Bin Raghu Kuli*(3), *Radha Proshadwasti v. Esuf*(4) and *Harendra Narain Singh Chowdhry v. Moran*(5) (where the result of a series of cases commencing with 16 W.R., p. 138 is given); though clearly when the tenancy has been determined by notice given by all, some of the co-sharers may recover their share (*Dwarka Nath Rai v. Kali Chunder Rai*(6)). The same view seems to be accepted in *Krishnama v. Gangaran*(7), where it was held that the plaintiff, the purchaser of four out of seven shares in a village, was not entitled to tender pattas under the Rent Recovery Act for the proportionate rent payable to him.

The decision in *Parameswaran v. Shangaran*(8) that one joint trustee cannot determine a tenancy and eject, which was followed in *Savitri Antarnjanam v. Raman Nambudri*(9), apparently proceeds on the same ground, though the learned Judges treat the case as one of temple management.

The difference between the English and the Indian cases appears to be that where there is a relation created by contract with several joint landlords, according to the English cases, that relation subsists, only so long as all of them wish it to continue, while, according to the Indian cases, it subsists until all of them agree to put an end to it; and it is not competent to any one of them to determine a contract which is entire, unless there are any special circumstances in the case, like collusion between a tenant and one of the lessors, etc.

To allow a co-owner to recover an undivided share would, in many cases, be a hardship to a tenant who might not be willing to continue in possession of a portion of the property or as a tenant in common with such co-owner. On the other hand to allow him

(1) 1 C. & M., 283.

(3) I.L.R., 3 Bom., 23.

(5) I.L.R., 16 Calc., 40 at p. 46.

(7) I.L.R., 5 Mad., 229 at p. 230.

(9) I.L.R., 24 Mad., 296.

(2) 12 B.H.C.R., 85.

(4) I.L.R., 7 Calc., 414 at p. 417.

(6) I.L.R., 13 Calc., 75 at p. 77.

(8) I.L.R., 14 Mad., 490.

to recover the entire property would be unjust to the others who may not wish the tenant to be turned out of their shares.

In this state of authorities and for the above reasons I hesitate to follow the English law. But I consider it unnecessary to decide that question as I am of opinion that the cases cited above have no application to this case.

In the English cases the action was to recover their undivided shares by one or more co-owners in the absence of the other sharers. The suit before us is also for partition and all the co-owners are parties to the suit.

Further, according to the plaintiff, the lands were leased to defendants Nos. 1 and 2 solely by the plaintiff, and the third defendant, whose interest has now passed to the fourth defendant, was subsequently recognized as a co-sharer by a transaction to which the defendants Nos. 1 and 2, the tenants in possession, were not parties.

It is not the case of a joint lease by joint tenants, and the rule that in such cases each leases his own share and can therefore put an end to it cannot apply to the case before us. For the same reason the tenant cannot be assumed to be contracting with each co-owner to the extent of his interest only, in the property, and it is clear that it is the intention of the parties to the lease, that must be enforced.

Cutting v. Derby(1) already cited, no doubt, is a case where the demise was by an owner who devised the rent and reversion to two tenants in common, one of whom was allowed to recover his undivided moiety, but in that case, the lease expired on a certain day, and the tenancy was not determined by notice though there was notice given. The case is similar to the Calcutta decisions, see *Dwarka Nath Rai v. Kali Chunder Rai*(2) and *Harendra Narain Singh Chowdhry v. Moran*(3) where a trespasser, it has been held, may be turned out by a co-owner, though one who entered as a tenant under all the co-owners may not be so turned out.

The rule of decision contained in sections 37 and 109 of the Transfer of Property Act, though they have not been declared applicable, ought, in my opinion, to be followed in the absence of any decisions of this High Court to the contrary. When the

(1) 1776, 2 W. Bl., 1077.

(2) I.L.R., 13 Calc., 75 at p. 77.

(3) I.L.R., 15 Calc., 40 at p. 46.

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plaintiff recognized the rights of the third defendant to a share of the property, then the tenants were bound to pay to each of the owners his proportionate share of the rent. What the proportionate rent is can only be determined by the plaintiff, the lessor, third defendant, who may be regarded as the transferee, and the tenants, the first and second defendants. If the apportionment is not amicably adjusted, it can only be done by a suit to which they all are parties. See section 109 and *Lootfulhuck v. Gopee Chunder Mojomdar*(1), *Ishwar Chunder Dutt v. Ramkrishna Dass*(2), *Zamindar of Ramnad v. Ramamany Ammal*(3) and that is the proper course to follow.

The tenants, defendants Nos. 1 and 2, are also bound on the determination of the tenancy to put the plaintiff in possession of only so much of the property as he has not transferred, and is bound to surrender to the third defendant or fourth defendant, his successor, the portion transferred by the plaintiff. They are not bound to perform the various obligations imposed on them as lessees, wholly in favour of either the plaintiff, or the fourth defendant, if such obligation is capable of severance, and such performance will not be to their prejudice. The rent payable and the property to be surrendered, unless all the parties agree, can be only ascertained in a suit to which all the lessors and the lessees are parties as in the case of apportionment of rent referred to in section 109, Transfer of Property Act.

The present suit is precisely of that nature. I see therefore no misjoinder of causes of action or of parties. The plaintiff prays for the surrender by defendants Nos. 1 and 2 of that portion of the property leased, of which he still continues to be the owner, and which has not been transferred to the fourth defendant, and for arrears of rent.

The fourth defendant is a necessary party to the suit to ascertain by partition the part transferred. The decision in *Saminada Pillai v. Subba Reddiar*(4) is clearly distinguishable as pointed out by the learned Chief Justice.

The ryots in that case were unnecessary parties, treating the suit as one for partition, and regarding it as a suit in ejectment, the case of each ryot was distinct from that of every other ryot.

(1) I.L.R., 5 Cal., 941.

(3) I.L.R., 2 Mad., 234.

(2) I.L.R., 5 Cal., 902.

(4) I.L.R., 1 Mad., 333.

In the case before us partition is necessary to dispossess defendants Nos. 1 and 2 and award delivery of possession to the plaintiff.

The decrees of the lower Courts must, therefore, be set aside in so far as they are against the appellant, and the suit remanded to the Court of First Instance for disposal on the merits.

Costs will abide and follow the result.

Second Appeal No. 407 of 1903.—This second appeal is dismissed with costs.

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RAMAYYA.

1905.
July 24,
August 8.

APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Boddam.*

VANMIKALINGA MUGALI (FIFTH DEFENDANT), APPELLANT,

v.

CHIDAMBARA CHETTY AND OTHERS (PLAINTIFFS AND
DEFENDANTS NOS. 2 TO 4 AND 6 TO 8 AND SIXTH DEFENDANT'S
REPRESENTATIVES), RESPONDENTS.*

Mortgagee, paying prior incumbrancer after sale, right of—Transfer of Property Act IV of 1882, s. 89—Effect of order absolute for sale.

It is settled law that, in the absence of clear proof to the contrary, it is to be taken that, when the money of a person interested in immovable property, as for instance, the owner of the equity of redemption or a puisne mortgagee, goes to discharge an anterior encumbrance affecting it, the presumption is that the anterior encumbrance enures to the advantage of the party making the payment, if it is for his benefit so to treat it; and this rule will apply in favour of a person who, after the sale of the properties in execution of a decree on the anterior mortgage, advances money on the security of such properties to enable the judgment-debtor to set aside such a sale under section 310-A of the Code of Civil Procedure.

Gokaldas Gopaladas v. Purammal Premeekhdas, (I.L.R., 10 Cal., 1035), referred to and followed.

The provisions of section 89 of the Transfer of Property Act have reference to the execution of a mortgage decree and ought not, in reason, to be so construed as to render the application of this principle impossible in cases where

* Second Appeals Nos. 346 and 347 of 1903, presented against the decrees of F. D. P. Oldfield, Esq., Acting District Judge of Tanjore, in Appeal Suits Nos. 316 and 317 of 1901, presented against the decree of M.R.Ry. T. Swami Ayyar, District Munsif of Tiruvalur, in Original Suits Nos. 16 and 70 of 1900, respectively.

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an order absolute for sale had been made on the ground that such order extinguished the security.

Dinobundhu Shaw Chowdhry v. Jogmaya Dasi, (L.R., 29 I.A.), referred to and followed in principle.

THE facts necessary for this report are fully set out in the judgment.

T. R. Ramachandra Ayyar for *V. Krishnaswami Ayyar* and *Mr. T. V. Gopalasami Mudali* for appellants.

The Hon. Mr. P. S. Sivaswami Ayyar for first, eighth and ninth respondents.

JUDGMENT.—In *Second Appeal No. 346 of 1903*.—The plaintiff sues upon a simple mortgage executed to him by the first and second defendants on the 29th July 1897 for Rs. 400. Part of the property comprised in the plaintiff's mortgage had been previously mortgaged to one Palavoy Swaminatha Pillai. The latter brought Original Suit No. 168 of 1892 in the Court of the District Munsif of Tiruvalur and obtained a decree on the 14th September 1892. In execution of this decree an order for the sale of the property was passed and the property put up to sale and knocked down to the decree-holder himself. But before the confirmation of the sale an application under section 310-A of the Civil Procedure Code was made by the judgment-debtors, and the sale was cancelled. The money deposited with this application was lent to the first, second and third defendants by the fifth defendant in the present case under a mortgage executed on the 1st November 1897, by which instrument the property comprised in the mortgage of the decree-holder was usufructually mortgaged to the fifth defendant, the mortgage containing, also, a covenant to pay. The mortgage recites the passing of the decree, the sale under it, and the loan being made to prevent the confirmation of the sale, and concludes with a statement that there is no other claim on the property than that subsisting under the mortgage in favour of the plaintiff. The usufruct was to be enjoyed in lieu of interest of the rate of which, however, no mention is made; but the fifth defendant, though entitled to the possession of their mortgaged property did not obtain it. The question is as to the rights *inter se* of the plaintiff and the fifth defendant in the circumstances.

On behalf of the fifth defendant it was contended that though his mortgage was in point of date subsequent to that of the plaintiff

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yet as the money advanced by him was for the purpose of discharging the prior encumbrance in favour of Palavoy Swaminatha Pillay which was binding on the plaintiff also, the fifth defendant's mortgage has priority over that of the plaintiff. Mr. Sivaswami Ayyar on behalf of the plaintiff sought to meet this contention in two ways. First, he urged that the presumption of the lien in favour of Swaminatha Pillay being preserved for the benefit of the fifth defendant should upon the facts of the case be held to have been rebutted—in other words—that the mortgage right of Palavoy Swaminatha Pillay had by act of parties been put an end to at the time the mortgage to the fifth defendant was made; and consequently, that that defendant could not claim any advantage with reference to what had thus ceased to exist. We are altogether unable to accept this argument. It is of course well settled that, in the absence of clear proof to the contrary, it is to be taken that, when the money of a person interested in immovable property, as for example, the owner of the equity of redemption or a puisne mortgagee goes to discharge an anterior encumbrance affecting it, the presumption is, that the anterior encumbrance enures to the advantage of the party making the payment, if it is for his benefit so to treat it. And so far from there being any thing in the facts of the case to rebut the presumption arising from the payment, an intention to keep alive the anterior lien, and pass the benefit thereof to the fifth defendant, would seem to be distinctly inferable from the terms of the instrument itself, viz., the recitals therein as to the decree, the execution thereunder and the loan being for the discharge of the decree debt. The allusion in the document to the mortgage of the plaintiff does not, in our opinion, argue to the contrary. As pointed out by Mr. Ramachandra Ayyar that clause was mainly intended as an assurance that the property mortgaged was subject only to that other claim without it being meant to suggest any relative superiority as between the two mortgages, such assurance not being uncalled for, having regard especially to the fact that the plaintiff's mortgage instrument comprised more property than that mortgaged to the fifth defendant.

Now as to the next argument Mr. Sivaswami Ayyar put it thus:—On the passing of the order absolute for sale Swaminatha Pillay's security became extinguished by virtue of the provision to that effect at the end of section 89 of the Transfer of Property

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Act, and the decree-holder and the judgment-debtors came, thereafter, to be precisely in the position of parties to a simple money decree and, consequently, the payment made by the fifth defendant could not operate to confer any right of lien affecting the plaintiff. What exactly was in the contemplation of the framers of section 89 in introducing the concluding sentence relied on by Mr. Sivaswami Ayyar is, it must be confessed, not easy to say. The passage from the work of MacPherson on mortgages cited by Mr. Sivaswami Ayyar and quoted at length in the judgment of Bhashyam Ayyangar, J., in *Mallikarjunadu Setti v. Lingamurti Pantulu*(1) shows that the learned author by no means felt very confident as to the meaning of the language in question of the legislature. Nor does Dr. Ghose appear to have understood the passage as free from difficulty (see Ghose on 'Mortgage,' 3rd Edition, page 898).

It is sufficient for the purposes of this case to say that the sentence in question in the section cannot be held to warrant the position maintained by Mr. Sivaswami Ayyar. So to read the provision would upset completely one of the main principles underlying the law of mortgages, viz., that the effect of a sale in execution of a mortgage decree is to vest in the purchaser at such sale the property as it stood at the date of the mortgage, and therefore free from that, and all subsequent encumbrances. If, after the order absolute, the decree-holder and judgment-debtor were reduced to the position of parties to a mere money decree, the sale of the mortgaged property could invest the purchaser only with the right of the judgment-debtor as at the date of the sale and therefore subject to encumbrances created by him prior to the time of the sale. It is impossible to believe that the legislature really meant by the provision in question to introduce such an absurdity with reference to the rights of mortgagees, which can only be protected by postulating the continuance of the lien down to the time of the sale, and the transfer of it thereafter to the sale-proceeds.

It is further to be observed that the provision under consideration has reference to a matter connected with the execution of a mortgage decree and ought not be understood as contemplating and affecting what does not necessarily relate thereto. Now the presumption arising from payment in circumstances like the present,

(1) I.L.R., 25 Mad., 244 at p. 281.

is one of general application and is a consequence of payments made whether in discharge of mortgage decrees or otherwise.

The Transfer of Property Act itself recognises the presumption in terms in the case provided for in section 101. No doubt one of the things avoided by the presumption in question is the unnecessary multiplication of written assignments of mortgages to person paying them off. But the principle of it is the prevention of unjust enrichment, as for instance, a puisne mortgagee benefiting at the expense of another person interested in the property who pays off encumbrances binding on the former, without intending to confer such a benefit on him. It was indeed as a principle of justice, equity and good conscience, that the rule was laid down in the leading case of *Gokaldas Gopaldas v. Puranmal Premsukhdas*(1) and has been enforced by the numerous authorities following it. And having regard to the acceptance thereof by the legislature itself in section 101 referred to above, the language of section 89 ought not, in reason, to be so construed as to render the application of such a principle to cases where an order absolute has been passed impossible.

In *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi*(2) a judgment-debtor, two days after the attachment of his property, executed a mortgage thereof and, as previously agreed upon, applied the mortgage, money in payment of two mortgages subsisting thereon, took to himself a reconveyance and handed over the old mortgage deeds to the new mortgagee.

One of the contentions urged was that section 276 of the Civil Procedure Code rendered the new mortgage even to the extent of the amount actually applied in payment of the prior mortgages void as against the attaching creditor and consequently as against the purchaser at the Sheriff's sale. This contention was rejected and the Judicial Committee held that so to construe section 276 would be quite wrong. It seems to us that to give to section 89 in question the effect sought to be given to it by Mr. Sivaswami Ayyar here would be equally wrong.

The decree of the lower Courts cannot be sustained. We accordingly direct that, in default of payment within 3 (three) months from this date by defendants Nos. 2 and 3 of the amount due to the plaintiff under his mortgage and costs, so much of the

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(1) I.L.R., 10 Cal., 1035.

(2) L.R., 29 I.A., 9.

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property mortgaged to him as is not comprised in the mortgage to the fifth defendant, will be sold and the proceeds applied in payment of what is due to the plaintiff. If the amount due to the plaintiff is not fully discharged thereby, the remainder of the mortgaged property shall be sold and the proceeds applied in the first instance towards the discharge of the fifth defendant's mortgage amount, viz., Rs. 750 and his costs throughout and the surplus, if any, applied so far as may be necessary in paying off the remainder of the plaintiff's claim. The decree of the lower Courts will be modified accordingly.

In Second Appeal No. 347 of 1903.—For like reasons a similar decree will be passed in Second Appeal No. 347 of 1903.

APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and
Mr. Justice Sankaran Nair.*

1905.
August
16, 29.

JALASUTRAM LAKSHMINARAYAN AND OTHERS (DEFENDANTS),
APPELLANTS,

v.

BOMMADEVARA VENKATA NARASIMHA NAIDU
(PLAINTIFF), RESPONDENT.*

*Civil Procedure Code—Act XIV of 1882, s. 13—Res judicata must be based
on the grounds stated in the judgment.*

A plea of *res judicata* must be based on the grounds of the decision actually stated in the judgment; and where such grounds are unequivocally stated but do not justify the decision, it is not proper or competent to substitute something else quite different which will justify it to enable one of the parties to found a plea of *res judicata*.

THE facts necessary for this report are set out in the judgment.

C. Ramachandra Rau Sahib for appellants.

V. Krishnaswami Ayyar for respondent.

* Civil Miscellaneous Appeal No. 224 of 1904, presented against the decree of F. H. Hamnett, Esq., District Judge of Godavari, in Appeal Suit No. 571 of 1903, presented against the decree of M.R.Ry. T. A. Narasimha Chariar, District Munsif of Bhimavaram, in Original Suit No. 485 of 1903.

JUDGMENT.—The present suit is for the recovery of kattubadi for faslis 1308 to 1310 stated to be due to the plaintiff, the Zamindar, by the defendants, in respect of certain inam lands held by them in the zamindari. The District Munsif dismissed the suit on the ground that the present claim was *res judicata* by the decision in Appeal Suit No. 20 of 1900, but the District Judge reversed the decree being of opinion that there was no *res judicata*.

We think the District Judge is right. In the previous suit, in which the appeal decision referred to above was given, the present plaintiff sought to recover from the present defendants the kattubadi for the same inam for eleven faslis from 1295 to 1305. No papers connected with the original trial of the former suit have been placed on the present record; and what were the several issues framed and tried at such original trial, does not appear. In the appellate judgment, the only document filed, the Judge after stating that "the defence was *inter alia* that the suit was barred by limitation and this question is the only one which need be considered in the appeal" gave a finding in the affirmative basing his conclusion upon the single circumstance that the plaintiff had not proved that he had collected any kattubadi within 12 years prior to the date of the suit. In thus disposing of the case the Judge did not quote the article of the Limitation Act according to which he held the claim barred. The argument on behalf of the appellant is that, the decision in the appeal judgment quoted, should be taken as if the Court had raised for its determination, the issue, whether the plaintiff's right to collect kattubadi had as a *periodically recurring right*, become barred under article 131 of the schedule to the Limitation Act and found upon that question against the plaintiff. Now with reference to the issue thus suggested, it would have been necessary for the Court to have determined whether the plaintiff was *refused* the enjoyment of the right 12 years previously to the suit. The mere fact that no kattubadi had been collected for 12 years by the plaintiff, did not necessarily imply, that such non-collection was in consequence of a denial of the plaintiff's right to the kattubadi, and the finding in the appeal judgment relied on is thus, in fact, not one which would have determined the point essential for the adjudication of the question in regard to article 131. Surely it is neither competent nor proper for us to depart from the unequivocal statement in the judgment as to what was decided and, because such decision would by itself be unsound with reference to the

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reason assigned for it, to substitute something else quite different in order to make it seem right so as to enable one of the parties thereto to found a plea of *res judicata* thereon.

The contention fails and the appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and
Mr. Justice Sankaran Nair.

1905.
August 23.

SUBRAYA PRABHU (PLAINTIFF), APPELLANT,

v.

MANJUNATH BHAKTA (DEFENDANT), RESPONDENT.*

Arbitration—Award to be filed in Court having jurisdiction over the matter submitted—Award not invalidated by want of notice nor by the arbitrators accepting a fee—Jurisdiction.

The omission to give notice of the meeting of the arbitrators to a party who had, prior to such meeting, notified to the arbitrators his withdrawal from the submission, does not invalidate an award; nor does the fact that the arbitrators, at the suggestion and with the consent of all parties accepted remuneration for their trouble, make the award illegal.

The Court having jurisdiction to file the award is determined by the value of the matter to which the arbitration related, and not by the amount actually allowed under the award.

Narsingh Das v. Ajodhya Prosad Sukul, (I.L.R., 31 Cal., 203), referred to.

PETITION under section 525 of the Code of Civil Procedure to file an award made on a submission to arbitration by plaintiff and defendant.

The defendant objected to the award being filed, alleging *inter alia*, that the arbitrators had been guilty of misconduct in having accepted remuneration for their services, and that no notice of some of the meetings of the arbitrators had been given to him.

The District Judge refused to allow the award to be filed.

The plaintiff preferred this appeal.

C. Ramachandra Rau Sahib and K. P. Madhava Rau for appellant.

C. V. Anantakrishna Ayyar for P. R. Sundara Ayyar for respondent.

* Appeal No. 82 of 1903, presented against the decree of R. A. Graham, Esq., District Judge of South Canara, in Original Suit No. 57 of 1902.

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JUDGMENT.—The application for filing the award was, in our opinion, rightly presented to the District Court, as the matter to which the arbitration related, involved a claim exceeding in value Rs. 2,500 (see *Narsingh Das v. Ajodhya Prosad Sukul*(1)) though the amount allowed under the award was less.

The next point for determination is whether the District Judge is right in holding that the award is invalid on the ground that notice of the meetings of the 21st and 23rd July was not given to the respondent. The facts bearing upon the question are these. There was a meeting on the 15th at which both the parties were present. Further enquiry was then adjourned to the 20th. On the 16th the respondent sent exhibit V to the arbitrators purporting to revoke the submission. The last paragraph of the notice runs thus: "I have cancelled the Muchilika in this respect (in the matter of the submission) and withdrawn it from arbitration. There is no need that you should proceed with the enquiry any longer. I shall file a separate suit to obtain relief. Take note of this." The notice reached the hands of the arbitrators on the 19th. No meeting was held on the 20th owing to the absence of one of the arbitrators; on the 21st and 23rd the arbitrators proceeded with the case *ex parte*, the respondent not appearing on either date, and eventually gave the award. The observations in *Harcourt v. Ramsbottom*(2) and *Scott v. Vansandam*(3) relied on by Mr. Ramachandra Rau Sahib on behalf of the appellant are clear authorities in support of the view that in cases like the present, omission to give notice to the respondent in no way invalidates the award.

Passing to the remaining contention on behalf of the respondent, we are unable to agree that in the circumstances of the case the acceptance by the arbitrators of the offer of a fee for their services involves any misconduct. The evidence shows beyond doubt that the offer proceeded from the parties themselves, and was made at a meeting of the arbitrators at which both the parties were present, and that it was accepted formally, record thereof being made in the proceedings of the arbitrators. We must therefore reverse the decree of the District Judge and direct that the award be filed.

The respondent will pay the appellant's costs throughout.

(1) I.L.R., 31 Cal., 203.

(2) 1 J. & W., 507 at pp. 511, 512.

(3) 6 Q.B., 237 at pp. 247, 248.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Boddam.

1905.
August 1.

RATNACHALAM AYYAR (PETITIONER), APPELLANT,

v.

VENKATRAMA AYYAR AND OTHERS (RESPONDENTS, NOS. 1 TO 10,
11TH RESPONDENT'S LEGAL REPRESENTATIVE, RESPONDENTS NOS. 13
TO 17 AND 24 TO 26, JUDGMENT-DEBTORS), RESPONDENTS.*

*Limitation Act XV of 1877, sch. II, art. 179.—Decree which leaves matters
to be subsequently ascertained.*

A decree which leaves certain matters to be subsequently ascertained becomes capable of execution as to them only when they are ascertained; and an application for execution of such a decree in regard to such matters will not be barred if presented within three years of the time when, by such matters being settled, it becomes executable.

This appeal arose out of proceedings in execution of the decree in Original Suit No. 42 of 1891, in the District Court of Trichinopoly. S, the adoptive father of the minor appellant, filed Original Suit No. 42 of 1891 and obtained a mortgage decree on the 13th August 1894. The mortgaged property was in the possession of several persons and the decree did not state the amount payable by each. S applied for execution on the 13th July 1895 and the defendants objected on the ground that the amounts payable by each had not been ascertained. A Commissioner was appointed, and the amounts ascertained by him were accepted by the Court on the 25th February 1896. On the 30th April 1896, the petition of S was dismissed for non-prosecution. S having died, an execution petition was filed on the 24th February 1899 by the guardian of the minor appellant. This petition was returned for amendment, and nothing further was done till the present application was presented on the 15th September 1903.

The substantial question in the case was whether the petition of the 24th February 1899 was in time.

* Civil Miscellaneous Appeal No. 208 of 1904, presented against the order of J. Hewetson, Esq., District Judge of Trichinopoly, in Interlocutory Application No. 745 of 1903, in Original Suit No. 42 of 1891.

The District Judge dismissed the application on the ground that it was barred by limitation.

The petitioner preferred this appeal.

V. Krishnaswami Ayyar and T. Natesa Ayyar for appellant.

T. V. Seshagiri Ayyar and K. S. Gopalaratnam Ayyar for respondents.

JUDGMENT.—The question is whether the execution of the decree in this case, so far as it relates to the sale of the mortgaged property, is barred by limitation; and this depends upon whether the application made on the 24th February 1899 on behalf of the appellant by the appellant's guardian was in time. No doubt judgment was delivered in this case on the 13th August 1894 and it is clear from it that the terms of the decree as to the sale of the land were left to be determined later on. The decree drawn up with reference to the judgment was not a final, or immediately executable, and effective decree so far as the land was concerned. Though the father of the appellant applied for execution, ignoring the fact that what had to be ascertained had not been ascertained before execution in the matter of the sale could issue, objections were taken by some of the defendants in possession of parts of the mortgaged property. Upon these objections a Commissioner was appointed to ascertain the values directed by the judgment to be ascertained and, on the report of the Commissioner so appointed, the District Judge passed an order on the 25th February 1896 accepting the Commissioner's valuations, and laying down the terms with reference to which the sale of the lands was to take place. It is this order which entitled the decree-holder to obtain relief in execution with reference to the sale of the lands. The application by the guardian of the appellant was within three years of this date and was therefore in time.

The order of the lower Court is therefore set aside and the application for execution will be restored to the file and proceeded with according to law. The respondents will pay the appellant's costs.

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v.
VENKAT-
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Ayyar.

APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and
Mr. Justice Sankaran Nair.*

1905.
August 25.

CHINNASAMI MUDALIAR AND ANOTHER (DEFENDANTS),
APPELLANTS,

AMBALAVANA MUDALIAR (PLAINTIFF), RESPONDENT.*

Specific Relief Act I of 1877, s. 42—Declaratory decree—Suit to declare that a person was not adopted by the plaintiff.

The setting up of an adoption alleged to have been made by the plaintiff is such an infringement of his right as sole owner as to entitle him to sue for a declaratory decree under section 42 of the Specific Relief Act declaring that the person alleged to have been adopted is not his adopted son. It is not necessary for the maintainability of such a suit that a claim must be set up by the party alleged to have been adopted.

Suit by the plaintiff for a declaration that the second defendant was not his adopted son. The first defendant was the natural father of the second defendant.

The District Judge passed a decree in favour of the plaintiff.

The defendants preferred this appeal.

The facts so far as they are necessary for this report are set out in the judgment.

T. V. Seshagiri Ayyar for appellants.

K. Ramachandra Ayyar for *S. Kasturiranga Ayyangar* for respondent.

JUDGMENT.—The plaintiff sues for a declaration that the second defendant is not his adopted son. The District Judge granted the declaration. Mr. Seshagiri Aiyar contends that such a suit does not lie. No doubt, as pointed out by him, there is nothing in the evidence to show that the second defendant himself has said or done anything with reference to the adoption. He is, however, a minor, and according to the case for the defence, he was a child under 18 months when the gift and acceptance are said to have taken place. He cannot therefore be expected to speak to the actual adoption considering that persons are taken in adoption when they are children, it would be impossible to hold that absence of proof of the kind commented upon by Mr. Seshagiri Ayyar

* Appeal No. 104 of 1903, presented against the decree of A. C. Tate, Esq., District Judge of Chingleput, in Original Suit No. 25 of 1902.

would disentitle a person in the position of the plaintiff from maintaining such a suit.

We are unable to accede to the suggestion that what has been shown in this case amounts to mere idle assertions by persons having no interest in the matter, and incapable of prejudicially affecting the plaintiff's rights. Admittedly, when the plaintiff advertised his properties for sale in 1898, one of the witnesses for the defence, the father of the woman, who would have been the adoptive mother if the adoption were true, issued printed notices setting up the adoption, now in question, and warning the intending purchasers of the second defendant's right in the property offered for sale and requiring them to desist from obtaining any transfers of the property from the plaintiff. Again in Original Suit No. 32 of 1901 on the file of the Court of the District Munsif of Chingleput, brought by a creditor of the plaintiff against him, the creditor apparently at the suggestion of the first defendant, the natural father of the second defendant, impleaded the boy as the adopted son of the plaintiff. The present first defendant having been appointed guardian *ad litem* filed a written statement on behalf of the second defendant raising certain contentions founded upon the alleged adoption. It is thus clear that the adoption has been set up under circumstances which would operate to the prejudice of the plaintiff if he did not take steps to have it declared not true, if, as he alleges, it never, in fact, took place; for an adopted son becomes from the moment of his adoption a coparcener with his adoptive father with all the incidents attaching to such a status under the Hindu Law. Consequently, the setting up of the adoption is such an infringement of the plaintiff's rights, if he is a sole owner, as to entitle him to obtain a declaration under the provisions of the Specific Relief Act. The decisions to which our attention was drawn by Mr. Seshagiri Ayyar have no bearing on a case like the present. We therefore overrule the objection that the suit does not lie. As to the merits we see no reason to differ from the District Judge's conclusion that the adoption has not been established. No doubt a number of witnesses speak to the gift to, and acceptance by, the plaintiff of the second defendant. But we do not think that the evidence is of such a character as to induce us to accept it as true in the face of the improbabilities referred to by the District Judge. We agree that, when the adoption is said to have taken place, it was altogether unlikely that the plaintiff would have thought of making the adoption. He

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was himself about 30 years of age and his wife was 5 or 6 years younger. There is no evidence worth the name that they were otherwise than healthy, and very soon after the time the adoption is said to have taken place, the plaintiff's wife became pregnant. Another circumstance strongly against the defence story is, the utter absence of written evidence in support of it between 1889 and 1898, when, for the first time, the adoption was, as already stated, set up. Considering that from the year 1893 the plaintiff and the first defendant have been quarrelling about family property and engaged in litigation, it is not probable that the first defendant would, if his present story be true, not have taken steps to secure the rights of the second defendant as adopted son, by claiming partition on his behalf, or securing recognition of the adoption in the proceedings connected with the partition. Lastly, there is the fact that, practically, throughout the whole period the second defendant has been maintained by the first defendant without the plaintiff contributing anything towards his support. The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Boddam.*

1905.
July 31.
August 1.

MEYAPPA CHETTI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

PERIANNAN CHETTI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 28—Misjoinder of parties—Claim in the alternative against debtors and agent of plaintiff.

The plaintiff, in a suit to recover money from certain persons alleged to have borrowed money from his agent, is entitled, when the alleged debtors deny the loan, to make his agent a co-defendant and pray for a decree in the alternative against such agent. Such claims are made in respect of the same matter within the meaning of section 28 of the Code of Civil Procedure.

Muthappa Chetty v. Muthu Palani Chetty, (I.L.R., 27 Mad., 80), distinguished.

SUIT to recover money alleged to have been lent by the fourth defendant, the plaintiff's agent, to the first defendant who was

* Civil Miscellaneous Appeal No. 193 of 1904, presented against the order of M.R.Ry. W. Gopalachariar, Subordinate Judge of Madura (East), dated 13th August 1904, in Original Suit No. 8 of 1904.

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the undivided father of defendants Nos. 2 and 3. The first defendant denied receipt of the money from the fourth defendant. The original plaint prayed for a decree against defendants Nos. 1 to 3 or in the alternative against the fourth defendant. The Subordinate Judge ordered the plaint to be amended by striking out the claim against defendants Nos. 1 to 3, or against the fourth defendant. Against that order the plaintiffs preferred the appeal.

V. Krishnasami Ayyar for appellants.

G. Krishnaswami Ayyar and *K. Jagannatha Ayyar* for respondents.

JUDGMENT.—The claim here was for the recovery of money stated to have been lent to the first defendant, the father of the second and third defendants, by the fourth defendant who was the plaintiffs' agent at Singapore. As the first defendant had prior to the suit denied that any loan had been made to him by the fourth defendant, and as the fourth defendant maintained that the loan was in truth made, the latter was impleaded and relief against him prayed for in the alternative in respect of the sum stated to have been lent. We agree with the contention on behalf of the appellant that section 28, Civil Procedure Code, warrants such alternative claims being made, the matter in respect of which the claim is made being the same within the meaning of the section. *Muthappa Chetty v. Muthu Palani Chetty* (1) is distinguishable. In that case the matter of dissolution of partnership with which the third defendant was concerned was distinct from, and unconnected with, the claim for damages in regard to which alone the first defendant was sought to be made answerable. See *Buddree Doss v. Hoare Miller & Co.* (2) and *Rajdhur Chowdhry v. Kalikristna Bhattacharjya* (3), *Madan Mohun Lal v. Holloway* (4), *Honduras Railway Co. v. Tucker* (5), *Child v. Stenning* (6) and *Bennetts & Co. v. McIlwraith & Co.* (7). We must therefore set aside the order of the Subordinate Judge, and the proceedings which have since taken place in pursuance thereof, and direct that the suit be proceeded with on the plaint as it originally stood and disposed of according to law. The costs will be provided for in the decree.

(1) I.L.R., 27 Mad., 80.

(2) I.L.R., 8 Calc., 170.

(3) I.L.R., 8 Calc., 963.

(4) I.L.R., 12 Calc., 555.

(5) L.R., 2 Ex.D., 301.

(6) L.R., 5 Ch.D., 695.

(7) L.R., (1896), 2 Q.B.D., 464.

PRIVY COUNCIL.

P.C.*
1905.
June 29.
July 3, 4.
November 16.

VENCATA NARASIMHA APPA RAO BAHADUR (PLAINTIFF),

v.

SOBHANADRI APPA RAO BAHADUR AND OTHERS
(DEFENDANTS).

[On appeal from the High Court of Judicature
at Madras.]

Service tenure—Grant of land for services—Grant in lieu of wages—Right of grantor to resume land when services are not required—Grant of mokhasa village for long period at unvarying quit-rent—Resumptive, suit for.

Where a grant of land is subject to a burden of service, and is not a mere grant in lieu of wages, the grantor has no right to put an end to the tenure whether the services are performed or not, as long as the grantees are willing and able to perform the services.

Leelanund Singh v. Munoorunjun Singh, (L.R.I.A., Sup., Vol. 181; 13 B.L.R., 124), followed.

A mokhasa village had been held by the defendants and their ancestors at a yearly quit-rent of Rs. 144 from a period antecedent to the introduction of British Government on conditions of service to provide a specified number of men as custodians of the grantor's property and to attend him on hunting or military expeditions. The services were rendered intermittently and not continuously, and batta was paid to the grantees when actually on duty. The quit-rent had never varied for a period of 120 years, and there had been no interference with the devolution of the property from heir to heir, nor any instance of resumption during that period:

Held, in a suit for resumption by the zamindar that he was not entitled to dispense with the services and resume the village at his option.

APPEAL from a judgment and decree (September 9th 1902) of the High Court at Madras, which reversed a decree (March 27th 1900) of the Subordinate Judge of Kistna, and dismissed the appellants' suit.

The suit was brought against the present first respondent, the Zamindar of Telaprole, and 16 other defendants, to recover possession of a village called Hanumantunigudem, together with mesne profits.

The village in question formed part of the ancient Zamindari of Nuzvid, the history of which will be found in the judgment of the Judicial Committee in *Venkata Narasimha Appa Row v.*

* Present: Lord DAVEY, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

Narayya Appa Row(1), and was granted by one of the zamindars to the ancestors of defendants Nos. 2 to 17. In 1783 the zamindari was confiscated by Government on account of the rebellion of Narayya the then zamindar. It was granted in the following year to his eldest son, and again resumed by Government in 1793 for arrears of revenue. In 1802 it was divided into two zamindaris; one of which, retaining the name of Nuzvid, was granted to Ramachandra, the second son of the rebel Narayya, and he received in respect of it a sanad dated 8th December 1802 in the ordinary form under Madras Regulation XXV of 1802. In the list attached to that sanad the village now in suit was mentioned among mokhasa villages, i.e., villages held on conditions of service. Ramachandra was succeeded by his son and then by his grandson, on whose death a suit was instituted which resulted in a decree for the partition of the estate among his six sons in accordance with the judgment of the Judicial Committee in the case above referred to. Under that decree, in 1882, the present appellant, and the father of the first respondent who were parties to the suit and brothers, each came into possession of a one-sixth share of the estate, and the village in suit fell within the share of the present appellant.

The main question in this appeal was whether the appellant was, under the circumstances, entitled to resume the mokhasa village in suit.

The Subordinate Judge gave him a decree which, on appeal to the High Court, was reversed and his suit dismissed.

The facts of the case are fully stated in the judgment of the High Court (DAVIES and BENSON, JJ.) which is reported in I.L.R., 26 Mad., 404.

On this appeal,

W. C. Bonnerjee and *C. W. Arathoon* for the appellant contended that the Subordinate Judge was right in holding that on the evidence in the case the village was resumable at the option of the appellant. The evidence showed that the grant was made for private or personal services to the zamindar: and in such a case it was open to him, if he chose to dispense with the services, or if they were not performed, to resume the lands granted. The grant in the present case was one of those defined in Wilson's 'Glossary'

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(1) L.R., 7 I.A., 38 at p. 44; I.L.R., 2 Mad., 128 at p. 186.

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under the term 'Amaram grants,' as grants resumable at will. It appeared too from the Report of a Circuit Committee in 1786 that the village in suit and the other mokhasa villages were "given by the zamindar and are resumable when he pleases." Reference was made to *Kooldeep Narain Singh v. Mahadeo Singh*(1), *Forbes v. Meer Mahomed Tuquee*(2), *Radha Pershad Singh v. Budhu Dashad*(3), *Mahadevi v. Vikrama*(4), *Sanniyasi Razu v. Salur Zamindar*(5), *Kooldeep Narain Singh v. The Government of India*(6), *Joykishen Mookerjee v. The Collector of East Burdwan*(7), *Unile Rajaha Raje Bommarauze Bahadur v. Pemmasamy Venkata-dry Naidoo*(8), *Narasayya v. Venkatagiri Rajah*(9), and *Mussamut Sona v. Leelanund Sing*(10). The decree of the Subordinate Judge had been wrongly reversed by the High Court, and the appeal should therefore be allowed.

Cohen, K.C., and *Kenworthy Brown* for the first respondent referred to *Venkata Narasimha Appa Row v. Narayya Appa Row*(11) to show how the first respondent came into possession of the village in suit, and contended that the grant was not of the nature described by the appellant in his plaint, and was not resumable by him. The village was granted permanently, but subject to certain conditions of service, and the services could not be dispensed with at the will of the zamindar, so long as the grantees were able and willing to perform them. *Forbes v. Meer Mahomed Tuquee*(2), *Kooldeep Narain Singh v. The Government of India*(6), *Leelanund Sing v. Munoorunjun Singh*(12), and the 5th Report of the Select Committee in the affairs of the East India Company (*Madras Edition*), Vol. II, page 4, were referred to. It was also contended that adverse possession for 14 years, 1882 to 1896, was a bar to the suit, and reference was made to *Secretary of State for India v. Krishnamoni Gupta*(13). The decision of the High Court was correct and should be upheld and the appeal dismissed.

Arathoon replied.

(1) (1866) 6 W.R., 199 at pp. 202, 204, 206, 208; B.L.R. Sup., Vol. 559 at pp. 564-566, 569, 574.

(2) 13 M.I.A., 438 at pp. 460, 464, 466; 5 B.L.R., 529 at pp. 544, 545.

(3) I.L.R., 22 Cal., 938 at pp. 940, 941. (4) I.L.R., 14 Mad., 365.

(5) I.L.R., 7 Mad., 268.

(6) 14 M.I.A., 247 at pp. 255, 257.

(7) 10 M.I.A., 16 at p. 45. (8) 7 M.I.A., 128 at p. 132.

(9) I.L.R., 23 Mad., 262. (10) 5 W.R., 280 at p. 292.

(11) L.R., 7 I.A., 33 at p. 44; I.L.R., 2 Mad., 128 at p. 130.

(12) L.R.I.A., Sup., Vol. 181 at p. 185; 13 B.L.R., 124 at p. 132.

(13) L.R., 29 I.A., 104; I.L.R., 29 Cal., 518 at p. 532.

On the 15th November 1905 the judgment of their Lordships was delivered by Sir ANDREW SCOBLE.

JUDGMENT.—The zamindari of Nuzvid, in the Madras Presidency, after protracted litigation, into the history of which it is unnecessary to enter, was partitioned in the year 1882. At the partition a sixth share of the estate was allotted to the plaintiff and appellant, including the village of Hanumantunigudem, which is the subject of the present proceedings. Prior to the partition, the father of the first respondent had obtained from the other sixteen respondents or their predecessors in title, whom it will be convenient to designate as the mokhasadars, leases for thirty years of the lands held by them in the village under mokhasa tenure, and the term of these leases is still unexpired. The appellant claims that the leases are invalid, and that he is entitled to resume the village. The Subordinate Judge decided in his favour, but the High Court, on appeal, reversed the decision. The sole question which their Lordships now have to determine is whether, having regard to the nature of the tenure, the village is resumable at the option of the appellant, the zamindar.

There is no doubt that Hanumantunigudem is what is known as a mokhasa village. The learned Judges of the High Court say that "mokhasa is a well-known tenure in the Northern Circars; and the term itself implies that it is a tenure subject to service." In Wilson's 'Glossary,' mukhasa or mokhasa is said to be irregularly derived from an Arabic word signifying "to have as one's own," and is defined as "a village or land assigned to an individual, either rent-free, or at a low quit-rent, on condition of service." There is no deed or sanad containing the particulars of the grant in this case, but the evidence shows that the village has been held by the mokhasadars and their ancestors on a quit-rent of Rs. 144 per annum from a period antecedent to the introduction of the British Government, and that the service to be rendered was that of one naik and fourteen peons, whose duty it was to guard the zamindar's fort and treasury, to watch over the reaping and threshing of the crops and to attend the zamindar on his hunting or military expeditions. These services, it is clear from a Report of the Inam Commission, were rendered down to 1860, when a mokhasadar represented that, "in consequence of the proximity of his village to Nuzvid, the call for their service was incessant;" and

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the obligation is recognized in the leases granted to the first respondent's father by the mokhasadars in 1881 in which there is a stipulation that they shall render service to the zamindar according to custom." There has, therefore, been no breach of this condition on the part of the respondents. Both Courts in India agree in holding that "the mokhasadars hold their lands conditional upon the performance of the services," which have been already specified.

The question remains whether the zamindar can dispense with the services and resume the land; and upon this point the Courts below differed. The Subordinate Judge held that "in the absence of any evidence . . . as to an absolute grant, or as to a gift burdened only with a condition of service, the only conclusion that can be come to upon the evidence in the case is that the village was granted by the zamindar before 1780 to an ancestor of the (mokhasadar defendants), for the purpose of rendering the services above mentioned"; and he found upon a specific issue that the grant was in lieu of wages.

The learned Judges of the High Court came to an opposite conclusion upon the facts. "In the first place," they say, "no office by any particular designation was conferred upon the original grantee, but an obligation of a feudal character was imposed upon him. He was simply to provide a specified number of men as custodians, so to speak, of the zamindar's property, and their services appear to have been rendered intermittently and not continuously. Besides, they were paid in money when they actually performed such services . . . that is to say, batta was given to them when actually on duty. It is also certain that in later years their services were not in frequent requisition, because, as Mr. Taylor points out in his Report, the zamindar would have had to pay in the shape of batta more than the services were worth. In the second place, the following circumstances indicated as plainly as possible a fixity of tenure. The mokhasadars have paid a uniform rent of Rs. 144 a year for the last 120 years without alteration at any time, and the land has descended from father to son hereditarily. There has been no instance of resumption or even an attempt at resumption during all this time. There has also been no attempt to enhance or to alter the rent, or to interfere with the devolution of the property from heir to heir."

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Without altogether adopting the further reasons adduced by the learned Judges in support of their view, their Lordships are of opinion that the considerations above stated are sufficient to establish that the grant in this case was a grant subject to a burden of service, and was not a mere grant in lieu of wages. This disposes of the case, for it is well settled that where lands are held upon such a grant, "as long as the holders of those grants are willing and able to perform the services, the zamindar has no right to put an end to the tenure whether the services are required or (not *Leelanund Singh v. Munoorunjun Singh*(1)).

Great stress was laid in the Courts below upon a statement contained in a note to an "Abstract of the Revenue Collections in the Nuzvid Zamindari," prepared by the Circuit Committee in 1786, in which it is stated that "the mockawsaw villaaes and grants being immediately under the zamindar, and given or resumed when he pleases, are included in Government collections." The Circuit Committee was appointed by the Government "to enquire into the state of the Northern Circars," with a view, *inter alia*, to the settlement of the revenue, and their Lordships would have been disposed to attach importance to this piece of contemporary evidence as to the relations between the mokhasadars and the zamindar, were it not that it appears from the Fifth Report of the Select Committee on the affairs of the East India Company (Vol. II, p. 4 of the Madras edition) that "few of the members of (the Circuit Committee) appear to have been acquainted with the native languages, and, as it is stated by themselves, they depended wholly for what intelligence they obtained on those subjects, on the zamindars and the native officers in the villages, the very persons most interested to conceal the truth, and to impose upon them false information." Their Lordships agree with the learned Judges of the High Court that although the records of the Circuit Committee may be good evidence with reference to the system upon which the Government claimed to deal with the zamindar's property, they cannot affect the rights of the mokhasadars as against the zamindar, with regard to which no independent enquiry appears to have been made.

Upon these considerations, their Lordships will humbly advise His Majesty that the decree of the High Court of Madras ought

(1) L.R.I.A., Sup., Vol. 181 (185); 13 B.L.R., 124 (182).

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to be confirmed, and this appeal dismissed. The appellant will pay the costs of the first respondent who alone defended the appeal.

Appeal dismissed.

Solicitors for the appellant: *T. L. Wilson & Co.*
Solicitor for the first respondent: *The Solicitor, India Office.*

APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.*

1905.
September
1, 12.

KACHAYI KUTTIALI HAJI (SECOND DEFENDANT), APPELLANT
IN APPEAL SUIT No. 90 OF 1903,
MOIDIEN KUTTI AND OTHERS (THIRD DEFENDANT AND HIS LEGAL
REPRESENTATIVES), APPELLANTS IN APPEAL SUIT No. 91 OF 1903,
AMBALATHINAKATH MAMAD (FOURTH DEFENDANT),
APPELLANT IN APPEAL SUIT No. 92 OF 1903,

v.

UDUMPUMTHALA KUNHI PUTHA AND OTHERS (PLAINTIFFS
AND THE FIRST DEFENDANT), RESPONDENTS IN ALL THE APPEALS.*

*Civil Procedure Code—Act XIV of 1882, s. 457—Guardian ad litem, appointment
of married woman as—Compromise by guardian, validity of.*

The appointment of a married woman as guardian *ad litem* in a suit instituted against a minor is a mere irregularity and a compromise by such guardian under proper advice when sanctioned by the Court cannot be set aside on any ground which would be insufficient to set aside a compromise between persons *sui juris*.

Mussamat Bibi Walian v. Banke Behari Pershad Singh (L.R., 30 I.A., 182).

Brooke v. Lord Mostyn, (2 DeG. J. & S., 373 at p. 416), referred to and followed.

The facts necessary for this report are set out in the judgment.

J. L. Rosario and V. Ryru Nambiar for appellant.

Mr. T. Richmond and M. Govindan Nair for respondents Nos. 1 and 2.

JUDGMENT.—The plaintiffs and the first defendant are Mahomedans following the Marumakkatayam system of law in

* Appeals Nos. 90 to 92 of 1903, presented against the decree of M.R.By. A. Venkataramana Pai, District Judge of North Malabar, in Original Suit No. 9 of 1901.

South Canara. Many years ago when their tarwad was about to become extinct, the then surviving male member Kunhammad adopted two females Kunhamma and Beiyathumma. The former of these died, leaving only a son Kutti Ammad. The said Beiyathumma having no issue adopted into the family the first defendant the daughter of a natural sister of hers and the first plaintiff, younger than the first defendant, the daughter of the first defendant's sister. The second and third plaintiffs are the minor children of the first defendant whose ages are stated to be 13 and 10 years respectively, represented by their next friend the natural brother of the first defendant. Kutti Ammad, who became the senior member of the tarwad after Beiyathumma, died in September 1891. Before his death he had executed three bonds, one for Rs. 8,000 on the 25th January 1891 to one Vythan Kutti, another for Rs. 4,000 on the 21st August 1891 to the second defendant and a third for Rs. 1,500 on the same day to the fourth defendant, the advances having been, according to the instruments, made for the necessities of the tarwad. The third defendant who is the assignee of the bond in favour of Vythan Kutti instituted Original Suit No. 28 of 1898 for the recovery of the amount due under the bond in the District Court of North Malabar against the first defendant and the plaintiffs. The second defendant brought Original Suit No. 41 of 1898 in the same Court for the recovery of the amount due under his bond, against the same parties. The fourth defendant instituted Original Suit No. 365 of 1898 in the Court of the District Munsif of Cannanore for the recovery of the amount due to him, impleading the same persons as defendants. In those three suits the present first defendant was appointed guardian *ad litem* of the present plaintiffs, her co-defendants. In all of them decrees were passed in accordance with compromises entered into by the respective plaintiffs, with the first defendant on her own behalf and on behalf of the present plaintiffs, leave to enter into the compromises having been previously obtained from the Courts. Applications for execution of the decrees by sale of the tarwad properties of the plaintiffs and the first defendant were made and granted, and properties were advertised for sale. But no sales took place, the same having been adjourned from time to time at the request of the judgment-debtors up to the beginning of the year 1901. On the 4th of March of that year the present suit was instituted for the purpose of removing the first defendant from her

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position as Karnavathi of the tarwad and restraining defendants Nos. 2 to 4 from selling any of the tarwad properties in execution of their decrees. The District Judge granted a decree to the plaintiffs as prayed for. The first defendant has acquiesced in the decree. The present appeals are by the second, third and fourth defendants only.

The decision of the District Judge against the appellants is upon the grounds that Kutti Ammad was a minor on the dates on which the three bonds referred to were executed and that the first defendant though fully aware of the fact of Kutti Ammad's minority at the time of the execution of those bonds, wilfully refrained from setting up that point in defence in the suits brought by the appellants and in collusion with them entered into the compromises upon which the decrees were passed.

[Their Lordships then discussed the evidence at length and found that the deceased Kutti Ammad was not a minor at the time he executed the bonds and that the first defendant was not guilty of any fraud in effecting the compromise.]

In the view we take of the grounds on which the decision of the District Judge rests, it follows that the decree made by him against the appellants could not stand unless a different result must ensue with reference to the objection urged by Mr. Richmond that the present plaintiffs are not bound by the compromise decrees as their guardian *ad litem* was at the time a married woman. That she was a married woman is, we think, true. How nevertheless she came to be appointed as guardian *ad litem* does not appear. Most probably her status as a married woman was treated as immaterial on account of the fact that she was the undoubted head of the tarwad and as such entitled to represent all the members thereof in spite of her marriage. Or it may be that her married state was overlooked because of the non-recognition of marriage as a legal institution in the case of the large majority of persons following the Marumakkattayam system of law. However this may be, the appointment of the first defendant as guardian *ad litem* of her co-defendants, the present plaintiffs, was doubtless a departure from the provisions of the Civil Procedure Code on the point. The objection to a married woman being appointed guardian *ad litem* in England owes its origin chiefly to the incompetence of a married woman to sue and be sued and to be answerable for

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costs. (See *In re Duke of Somerset Thynne v. St. Maur*(1).) And though the objection finds a place in our Code of Procedure it is to be noted that the draft Code now before the Legislative Council proposes to modify the law by removing such disability on the part of married women in this country. (Select Committee's Report, clause 445.) It may be added that the disability in question exists here only in respect of a married woman's appointment as guardian *ad litem*, and not in respect of her acting as next friend as is the case in England. The appointment of the first defendant must therefore be held to be a mere irregularity (*cf. Mussammatt Bibi Walian v. Banke Behari Pershad Singh*(2)), which did not prejudice and could not have prejudiced the plaintiffs in the slightest degree. That the compromises affected the first defendant as much as they did the plaintiffs is a circumstance pointing to their having been come to, *bonâ fide*. Further the terms thereof were arrived at with the assistance of third persons who befriended both sets of parties and apparently through their mediation the appellants consented to make considerable reductions in the amounts claimed by them according to the terms of their bonds. And lastly the leave of the Court was duly obtained in the case of each compromise. Now it is clear law that a compromise sanctioned by Court on the part of an infant cannot be set aside by him on any ground which would be insufficient to set aside a compromise between persons *sui juris* (*Brooke v. Lord Mostyn*(3)). The reversal by the House of Lords of the decision of the Lords Justices in that case was on the facts and did not touch the statement of the law to the above effect by Lord Justice Turner in *Mostyn v. Brooke*(4). Though there is a vague statement in the plaint that the first defendant acted in collusion with the appellants in obtaining the decrees in question no specific ground or grounds which would invalidate the leave granted by the Courts and avoid the decrees made in pursuance of such leave, are alleged and none proved. How then can the appellants be restrained from executing the decrees against the tarwad properties?

For all the foregoing reasons we allow the appeals and modify the decree of the District Judge by dismissing the suit in so far as the appellants are concerned with costs in this and in the lower Court.

(1) L.R., 34 Ch.D., 465.
(2) DeG.J. & S., 378 at p. 416.

(3) L.R., 30 I.A., 182.
(4) L.R., 4 H.L., 304.

APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Boddam.*

1805.
September
12, 13.

ARAYALPRATH KUNHI POCKER AND OTHERS (DEFENDANTS
Nos. 7, 8, 23 to 33), APPELLANTS,

KANTHILATH AHMAD KUTI HAJI AND OTHERS (PLAINTIFF
AND DEFENDANTS Nos. 1 to 6, 9 to 13 AND 15 to 22),
RESPONDENTS.*

*Hindu Law—Marmakatayam Law—Division amongst joint owners, when binding
on minors—Arrangement not binding to which all members are not parties.*

Joint owners governed by the Marmakatayam Law can allow one or more of themselves to take any portion of the joint property as his or their separate property. Such transaction requires the consent of every one interested in the property; and where there are minors incapable of consenting, the transaction to be binding on the Tavazhi must be for consideration and beneficial to the family as a whole.

SUIT to recover the amount due on a mortgage executed by defendants Nos. 1 to 3 in favour of the Bank of Madras at Tellicherry in 1893 by sale of the plaint properties belonging to defendants Nos. 2 and 3. The plaintiff had become entitled to the mortgage right by assignment. The plaintiff sought to enforce his right against properties which were the separate properties of the defendants Nos. 2 and 3 and also against their shares in certain properties which belonged to their respective Tavazhis and which shares they were permitted by the other members of the Tavazhi to deal with at their pleasure under exhibits A and FF, respectively. It was contended that these documents were not binding on members of the Tavazhi who were not parties to the arrangement and that defendants Nos. 2 and 3 did not obtain a saleable interest thereunder. The lower Court passed a decree in favour of the plaintiff, declaring his right to proceed against all the plaint mentioned properties.

Against this decision this appeal was preferred.

* Appeal No. 71 of 1903, presented against the decree of M.R. Ry. M. Achutan Nair, Subordinate Judge of North Malabar, in Original Suit No. 7 of 1902.

J. L. Rosario for appellants.

C. Ramachandra Rao Sahib for the Hon. Mr. P. S. Sivaswami Ayyar, and *B. Govinda Nambiar* for first respondent.

C. V. Anantakrishnan Ayyar for eighth, ninth, eleventh and twelfth respondents.

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JUDGMENT.—In this case the appellants did not press the appeal in respect of the properties found by the lower Court to be separate properties of the second and third defendants, apart from exhibits A and FF. The question is thus limited to the share alleged to have passed to the second defendant under exhibit A, and to the share alleged to have passed to the third defendant under exhibit FF. If the effect of these documents was not to transfer validly to the respective transferees the share intended to be transferred to them, the appeal so far must succeed. Both the documents relate to property held by the parties thereto and others as joint property governed by Marmakatayam Law. No doubt it is competent to the owners of such property to divide the same by mutual consent though no suit for compelling a partition will lie. On analogy therefore it would be competent to such joint owners to allow any one or more of themselves to take any portion of the joint property as his or their separate property. That such transactions however require the consent of each and every one of the persons interested in the property is unquestionable. If there are minors who are not in a position to give their consent, no partition or other arrangement as referred to above will, as a rule, be binding upon them. It may be that, if the arrangement can be shown to have been entered into for considerations beneficial to the family as a whole including the minor members, the minors are bound. The question therefore is whether the transactions evidenced by exhibits A and FF are valid with reference to the view of the law just stated. In regard to the former document it is found that there was at least one member of the Tavazhi in existence at the time of its execution who did not join in it and who was then a minor, namely, the twenty-sixth defendant. As it is not alleged that the arrangement made under exhibit A was for any consideration binding upon Tavazhi to which the executors of the instrument and the twenty-sixth defendant belonged as a whole, and as the twenty-sixth defendant was incapable of assenting to the transaction, being then under age, it follows that the transaction failed to bind the Tavazhi and the second

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defendant acquired under it no separate share in the Tavazhi properties. We are unable to attach any weight to the argument of Mr. Ramachandra Row Saib appeared that, having regard to the state of the decisions of this Court prior to the Full Bench decision *Kunhacha Unma v. Kutti Mammi Hajee*(1) in regard to the character of interest taken by persons to whom property was given to be held by them as joint property according to Marumakatayam Law, exhibit A should be held to have conferred on the second defendant a right to treat his share given by exhibit A as his separate estate. It is sufficient to state that the deed itself was executed after the Full Bench decision referred to though we should not be understood as implying that a different view would have had to be taken with reference to such a deed if it had been executed prior to the said decision. We are also unable to accept the suggestion that the twenty-sixth defendant ratified the arrangement. This question of ratification was not made the subject of an issue in the lower Court and the evidence to which our attention was drawn by Mr. Ramachandra Row Saheb as bearing upon the point shows that she was not of age when she is stated to have joined in the application exhibit N, on which the contention of ratification is rested though no doubt she was not there represented as a minor and though she did not purport to appear by a next friend.

Passing now to exhibit FF it is clear upon the face of the instrument that the Tavazhi concerned in it consisted among others of three persons at the time of its execution who were incapable of assenting to the transaction intended to be effected thereby on the ground of their minority. As in this instance also it is not alleged that any consideration passed from the third defendant to the Tavazhi that could make it an instrument binding upon the branch as a whole, we must for reasons already given hold that the third defendant acquired no separate share under it. In this view it is not necessary to consider the other contentions raised on behalf of the appellants.

We therefore modify the decree of the lower Court in so far as it declares the plaintiff's right to sell items Nos. 1 to 20 and Nos. 25 to 58 inclusive of the plaint properties and dismiss the

(1) I.L.R., 16 Mad., 201.

suit to that extent, otherwise the decree of the lower Court is affirmed.

The parties will pay and receive proportionate costs of this appeal.

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APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.*

GIRIYA CHETTIAR (PLAINTIFF), APPELLANT,

v.

SABAPATHY MUDALIAR AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1905.
September
5, 6, 21.

Res judicata—Bar only when jurisdiction concurrent as regards pecuniary value as well as subject matter—Effect of augmentation of claim by subsequent interest—Transfer of Property Act IV of 1882, s. 85.

A judgment in a previous suit does not operate as *res judicata* in a subsequent suit in respect of the same subject matter if the value of the matter of relief in the subsequent suit is above the pecuniary limits of the jurisdiction of the Court which decided the previous suit. In order to create an estoppel the jurisdiction of the two Courts must be concurrent as regards pecuniary limit as well as subject matter.

Rajah Run Bahadoor Singh v. Mussumut Lachoo Koer, (L.R., 12 I.A., 23), followed.

The augmentation of the claim in the first suit by subsequent accrual of interest will prevent the estoppel operating.

Gopi Nath Chobey v. Bhugwat Pershad, (I.L.R., 10 Calc., 697), distinguished.

Pathuna v. Salimamma, (I.L.R., 8 Mad., 83), distinguished.

Mortgage suits do not form an exception to this rule and the Legislature cannot, in the absence of apt provisions, be presumed to have intended to modify the rule of *res judicata* by enacting section 85 of the Transfer of Property Act.

Obiter Section 209 of the Code of Civil Procedure does not apply to mortgage decrees.

THE facts necessary for this report are fully set out in the judgment.

The Hon. Mr. P. S. Sivaswami Ayyar for appellant.

T. R. Ramachandra Ayyar and T. R. Krishnaswami Ayyar for fourth respondent.

T. V. Gopalasawmy Mudaliar for third and fifth respondents.

* Appeal No. 37 of 1903, presented against the decree of Vernon A. Brodie, Esq., District Judge of Coimbatore, in Original Suit No. 26 of 1901.

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JUDGMENT—Sir S. SUBRAHMANIA AYYAR, Offg. C.J.—The plaintiff-appellant obtained from the first and second defendants and the guardian of the third defendant, on the 4th October 1897, a mortgage for Rs. 2,200 lent at an interest of 18 per cent. per annum. The property mortgaged to the plaintiff was again mortgaged by the said mortgagors to one Damodaram Chetty on the 11th July 1899. Damodar brought a suit on his mortgage Original Suit No. 188 of 1900 on the file of the District Munsif of Coimbatore making the mortgagors and others, interested in the property, defendants, including the present plaintiff who was the sixth defendant there. The plaintiff's mortgage was admitted by all the parties to the suit and the plaintiff appearing in person consented to the outright sale of the plaintiff property subject to his being allowed to realise what was due to him in the first instance. The decree passed in the case provided *inter alia* that in default of payment of the sum due to Damodara within the date fixed, viz., the 10th October 1900, the property or a sufficient portion thereof should be sold and the proceeds of such sale, after defraying thereout the expenses of the sale, should be applied in payment of what was due to the present plaintiff, viz., Rs. 2,200 with interest at 18 per cent. per annum from the 12th July 1899 (the interest prior thereto having been paid off) to the 30th January 1900 the date of the plaint in that case, and at 6 per cent. per annum from the latter date to realization, and the balance, if any, applied towards the discharge of Damodar's debt. The decree did not authorise the present plaintiff to apply for sale. His right to be paid out of the sale-proceeds depended upon a sale taking place on the application of Damodar. Though the property was advertised for sale on the latter's application, no sale took place as his debt was paid off, and the execution proceedings were dropped by him. In the present appeal the only dispute is as to the rate of interest to which the plaintiff is entitled subsequent to the 30th of January 1900.

The District Judge held that the plaintiff was precluded from claiming more than 6 per cent. per annum the rate mentioned in the decree Damodar's suit. No doubt the plaintiff could not have claimed anything but that rate in execution proceedings there. But the question is whether he is disentitled in the present suit to claim the contract rate of 18 per cent. subsequent to the 30th of January 1900. It does not appear from the record of Damodar's

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suit why the decree therein provided only 6 per cent. It was clearly not upon any express consent given by the plaintiff. Probably it was fixed in exercise of the power under section 209 of the Civil Procedure Code erroneously supposed to be applicable to mortgage decrees also. However this may be, does the provision as to 6 per cent. in the decree operate as *res judicata* in the matter as contended for the fourth defendant who is a purchaser of the equity of redemption of the first, second, and third defendants? Now let us concede for argument that the direction as to 6 per cent. in the decree involves a finding on the point; that is not binding in the present case as the total amount of claim here exceeds Rs. 2,500 and the Court which decided Damodar's suit was not competent to try the present. It was however urged that at the time the decree was passed in that case the amount due to the plaintiff was under Rs. 2,500 and the increase due to subsequent interest should not be held to affect the question on the analogy of the decisions in *Gopi Nath Chobey v. Bhugwat Pershad*(1) and *Pathuma v. Salinamma*(2). In those cases the prior and the subsequent suits related to identical properties and the fact that the market value thereof had increased in the interval between the two suits was held not to prevent the estoppel operating between the parties. But the augmentation of the claim by accrual of interest is not similar to a rise in the market value of one and the same property. No doubt the *subject matter* of the decree in Damodar's suit, so far as it affected the present plaintiff, is also that to which the present suit relates, viz., his mortgage right. But the matter of relief is different inasmuch as the amounts vary. And *Misir Raghobardial v. Rajah Sheo Baksh Singh*(3) and *Rajah Run Bahadur Singh v. Mussumut Lachoo Koor*(4) which settled the law on the point under consideration, lay down that concurrent jurisdiction for the present purpose means "concurrent as regards pecuniary limit as well as the subject matter." The former of these rulings was itself in a case of mortgage. There the suit was for principal (Rs. 12,000) and interest upon a bond brought in the Court of a Deputy Commissioner, and, with reference to a plea that in a suit for interest only brought in the Court of an Assistant Commissioner it had been held that

(1) I.L.R., 10 Cal., 697.
(3) L.R., 9 I.A., 197.

(2) I.L.R., 8 Mad., 83.
(4) L.R., 12 I.A., 23 at p. 37.

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Rs. 1,790 and not Rs. 12,000 was the amount of *principal*, and *interest* had been decreed thereon accordingly it was held that there was no *res judicata* as regards the principal amount of the bond as the pecuniary limit of the Assistant Commissioner's jurisdiction was only Rs. 5,000. It was contended that such a view was no longer maintainable and the argument in support of it was:—"On the one hand, section 85 of the Transfer of Property Act requires that all parties having an interest in property comprised in a mortgage should be impleaded in the suit brought thereon. On the other, the jurisdiction of the Court in a suit upon a mortgage is governed by the plaintiff's mortgage amount and under section 15 of the Civil Procedure Code every suit has to be instituted before the lowest Court of competent jurisdiction. To lay down, in such circumstances, that no adjudication by such last-mentioned Courts in respect of matters affecting the mortgaged property with reference to claims in excess of their pecuniary jurisdiction is binding on the parties thereto in a subsequent litigation coming before a higher Court, would be altogether to frustrate the object which the Legislature must have had in view in enacting section 85 of the Transfer of Property Act." But the direction contained in that section is only an old rule of practice as to parties and it cannot rightly be held that the embodiment of it in the statute modifies the principle of *res judicata* laid down in the Privy Council cases already cited with reference to decisions by Courts of inferior jurisdiction. In this view no doubt findings arrived at with reference to matters affecting the rights of defendants in mortgage suits may at times be of no avail as estoppel in a superior Court with reference to the same points. But such also is the result in other descriptions of suits where a matter gone into by a Court of lower jurisdiction, properly for its own purposes, is inefficacious as *res judicata* in suits tried before Courts of higher jurisdiction. If it be considered that mortgage suits should form an exception in this respect, it is for the Legislature to introduce such an exception by apt provisions.

I would therefore modify the decree of the District Judge by awarding to the plaintiff interest at 18 per cent. per annum till the date fixed for payment, viz., the 5th January 1906 and 6 per cent. per annum subsequently with costs of the plaintiff throughout.

SANKARAN NAIR, J.—There was no decision in the previous suit that the present plaintiff was only entitled to interest at 6 per cent.

from the 30th January 1900. On the assumption that the relation then subsisting between the parties was to be determined by those proceedings, the plaintiff was awarded, as a matter in the discretion of the Judge, that rate from the date of the plaint to the date of realization which means in my opinion realization in the course of those proceedings. It was not intended as a restriction of the plaintiff's right if there was no realization. I concur accordingly.

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APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.

TADEPALLI SUBBA RAO (PLAINTIFF), APPELLANT,

"

NAWAB SAYED MIR GULAM ALLIKHAN OF BANGANA-
PALLI (DEFENDANT), RESPONDENT.*

1905.
August
20, 30.
September 8.

Jurisdiction—Non-resident foreigner—Subjects of protected Native States may be sued if cause of action arises within the jurisdiction.

A non-resident foreigner, who is a subject of a protected Native State, may be sued in the Courts of British India, if the cause of action arose within the jurisdiction of any such Court. Even apart from the provisions of section 17 of the Code of Civil Procedure, the cause of action in the case of contracts arises at the place of performance.

Annamalai Chetty v. Murugesu Chetty, (I.L.R., 26 Mad., 544), followed.

THE facts necessary for this report are set out in the judgment.

Dr. Swaminadhan, V. Krishnaswami Ayyar and T. Ramachandra Rao for appellant.

No one appeared for respondent.

JUDGMENT—Sir S. SUBRAHMANIA AYYAR, Offg. C.J.—The plaintiff, the endorsee of a promissory note executed by the defendant, sues for the money due thereon. The defendant is a foreigner whose place of domicile is Banganapalle, one of the protected native territories in this Presidency, and at the time of the suit the defendant resided there. The execution of the note was also in the same place. But the note in terms provides

* Appeal No. 109 of 1903, presented against the decree of M.R.Ry. I. L. Narayana Rao, Subordinate Judge of Kistna, in Original Suit No. 31 of 1902.

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that the amount thereof was to be paid at Masulipatam. The Subordinate Judge of Masulipatam dismissed the suit on the ground that he had no jurisdiction to entertain it.

The decree, it seems to me, cannot be sustained. In *Annamalai Chetty v. Murugesu Chetty*(1) it is laid down that the case of *Girdhar Damodhar v. Kassigar Hiragar*(2) was correctly decided. The ground for that case being upheld by the Judicial Committee, was that the cause of action had arisen in Bombay, as will be seen from the following passage in the judgment of Lord Lindley:—

“Their Lordships see no reason for doubting the correctness of the decision of the case of *Girdhar Damodhar v. Kassigar Hiragar*(2) where the defendant was a native of Cutch and the cause of action arose within the local limits of the jurisdiction of the British Indian Court in which the action was brought.” See *Annamalai Chetty v. Murugesu Chetty*(1). Now the very same ground of jurisdiction existed in the present case with reference to the Court at Masulipatam, the place expressly agreed upon for the performance of the contract of the defendant. There never was any doubt as to the place of fulfilment being the place where the cause of action arises, apart from any legislative enactment; and the provisions of section 17, Explanation III (ii) and (iii) of the Civil Procedure Code are but statutory affirmations of recognised principles of jurisprudence about which much will be found stated in the judgment of Holloway, J., in *DeSouza v. Coles*(3), *Mathappa Chetti v. Chellappa Chetti*(4) shows no doubt that Holloway, J., was not, in 1876, disposed to follow Savigny to the extent to which the learned Judge had done in *DeSouza v. Coles*(3), but the modification of opinion on the part of the learned Judge was not with reference to what constituted a cause of action but, as to the proper forum in personal actions according to the true principles of Private International Law, a point on which there has long existed considerable divergence of opinion among the writers on the subject. His conclusions on the point were similar to those since adopted in the Farridkote case which the Subordinate Judge has followed. The statement of the law by the Earl of Selbourne in that case that the accrual of the cause of action in a particular place does not confer

(1) I.L.R., 28 Mad., 544 at p. 552.
(3) 3 M.H.C.R., 384.

(2) I.L.R., 17 Bom., 662.
(4) I.L.R., 1 Mad., 196.

on the Courts of that place jurisdiction over a non-resident foreigner is not referred to by Lord Lindley, but that does not relieve us from the necessity of being ruled by the latest pronouncement of the Judicial Committee on the point. Whether what weighed with their Lordships in the last-mentioned case in upholding the decision of the Bombay Court in *Girdhar Damodhar v. Kassigar Hiragar*(1) was the dependent character of the foreign territory or the argument of convenience with reference to commercial relations between the residents of the paramount and the protected states urged by Bittleston, J., in *Bavah Meah Saib v. Khajee Meah Saib*(2), by Sargent, C.J., in *Girdhar Damodhar v. Kassigar Hiragar*(1) by Farran, C.J., in *Ram Raji Jambhekar v. Pralhaddas Subkarn*(3), and by Candy, J., in *Rambhat v. Shankar Baswant*(4) is a matter which it is not for us to enter. Assuming that the rule laid down in *Annamalai Chetty v. Murugesu Chetty*(5) was not intended to extend to subjects of a foreign independent state, but was confined to subjects of protected Indian territories, the present is such a case, and there is no alternative but to reverse the decree of the Subordinate Judge and remand the suit for disposal according to law. I would make the order accordingly leaving the costs to abide and follow the result.

SANKARAN NAIR, J.—I agree. We are bound by the decision of the Privy Council, in the case cited, to hold that a British Indian Court has jurisdiction to entertain a suit, if the cause of action has arisen within the local limits though the defendant does not reside within such limits, but is a foreigner, domiciled and residing in a protected Indian State.

(1) I.L.R., 17 Bom., 662.
(3) I.L.R., 20 Bom., 133.
(5) I.L.R., 26 Mad., 544 at p. 552.

(2) 4 M.H.C.R., 218.
(4) I.L.R., 25 Bom., 528.

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APPELLATE CIVIL.

Before Sir S. Subrahmaniam Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.

MUTHURAMAN CHETTY (PLAINTIFF), APPELLANT,

v.

KRISHNA PILLAI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1905.
August
10, 11.

Trust Act II of 1882, s. 84--No right to recover even where unlawful agreement only partly carried out--Decision not bad although no distinct issue when parties not taken by surprise.

The rule that a person *in pari delicto* cannot recover, is applicable not only where the unlawful agreement has been fully carried out but also where there has been part performance of a substantial character of such agreement. This is the construction which ought to be placed on the words 'not carried into execution' in section 84 of the Indian Trusts Act.

Where a point, on which there is no distinct issue, is present to the minds of the parties, the decision on such point cannot be impeached on the ground that there was no issue raised.

THE facts necessary for this report are fully set out in the judgment.

S. Srinivasa Ayyar for V. Krishnaswami Ayyar for appellant.

T. Subrahmaniam Ayyar for the Hon. Mr. P. S. Sivaswami Ayyar for respondents.

JUDGMENT.—The plaintiff-appellant sues for the recovery of the price alleged to have been paid by him to the first defendant on account of the sale of land (exhibit A) executed by that defendant to the plaintiff on the ground that he has been deprived of the land in consequence of the judgment in Original Suit No. 496 of 1901 on the file of the Court of the District Munsif of Chidambaram brought by one Shanmugam Pillai. That suit was on the ground that the property belonged to Shanmugam Pillai, having been orally sold to his father by the then admitted owner one Ponnusami Pillai, the sale being followed by possession, and further, subsequently supported by an unregistered instrument of sale. The present plaintiff who was a party to that suit set up

* Second Appeal No. 733 of 1903, presented against the decree of R. D. Broadfoot, Esq., District Judge of South Arcot, in Appeal Suit No. 229 of 1902, presented against the decree of M.R.Ry. C. Krishnasami Row, District Munsif of Chidambaram, in Original Suit No. 157 of 1902.

an alleged title under exhibit A, a registered document. The then plaintiff Shanmugam Pillai's answer to the defence thus set up was that *exhibit A* was brought about by fraud, the present plaintiff being the prime mover in it. Shanmugam alleged that the father of the present plaintiff while in possession of the land as his (Shanmugam's) tenant wanted to purchase the land, but that Shanmugam refused to sell; and that the conveyance (exhibit A) was thereupon obtained from the first defendant to whom Ponnusami Pillai's son was made to execute a sale-deed in pursuance of a conspiracy to deprive the plaintiff of the land with reference to the provisions of the Registration Act which give priority to registered transfers over oral or unregistered transfers in certain circumstances. The Court after trial decreed possession to Shanmugam and, in doing so, came to the conclusion that the sale-deeds relied on by the present plaintiff were not *bonâ fide* but executed in the circumstances set up by Shanmugam Pillai. This, however, is not a finding on which the actual decree given is to be taken as necessarily resting, for it was also found that the oral sale to Shanmugam was accompanied with possession and therefore was unaffected by the registered instruments relied on by the plaintiff. In answer to the claim here for the refund of the purchase-money, the first defendant *inter alia* pleaded that the plaintiff as one concerned in the fraud, of which the execution of *exhibit A* formed a part, was not entitled to seek the relief claimed, and further alleged that though the amount stated as the price was paid to him it was merely for the purpose of the amount being passed on to Ponnusami Pillai's son who executed the deed purporting to be a sale to the first defendant on the understanding that the first defendant should execute *exhibit A* later on. This answer was set up not in so many words but by reference to the conclusions of the Court expressed in the judgment in Original Suit No. 496 of 1901 (*exhibit C*) already referred to. No oral evidence was called on either side, the parties contenting themselves with filing a few exhibits of which the copy of the judgment in that suit was one. We are unable to accept the suggestion on behalf of the plaintiff that the question of fraud was not in the present case relied on before the District Munsif. The explanation which the District Munsif attempts to give in his present judgment with reference to his conclusions in the matter in the previous judgment shows that the point was raised before

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him this time also. On appeal the District Judge has taken a different view from the District Munsif and has arrived at the finding that the first defendant's defence under consideration is made out by the evidence in the case, and that the plaintiff as a person *in pari delicto* is not entitled to the relief prayed for. Though no express issue was framed with reference to this contention it is clear from what has been said that the point was present to the minds of the parties and if further materials which may have a bearing on the question were not placed before the Court, it was not due to the absence of a distinct issue in connection with it, nor are we able to agree with the suggestion, that the evidence on the record establishes nothing more than a mere knowledge on the part of the plaintiff of an infirmity in his vendor's right to convey. The District Munsif's judgment in Original Suit No. 496 of 1901 filed by the plaintiff himself refers to circumstances which point almost irresistibly to the conclusion that the execution of the conveyances by Ponnusami Pillai's son to the first defendant and by the latter to the plaintiff were solely for the purpose of defeating, if possible, the right of Shanmugam Pillai to the land. It follows therefore that the transaction which the plaintiff relies on as giving him the right to sue in the present case was part of a fraud in which the plaintiff was concerned.

It was next urged that even in the above view the plaintiff is not debarred from seeking relief, as Shanmugam Pillai was not in fact defrauded and our attention was drawn to section 84, Indian Trusts Act. The cases of *Kearley v. Thomson*(1) and *Herman v. Jeuchner*(2) are clear authorities that under the English Law the unlawful agreement need not be fully carried out, to warrant the application of the rule as to persons *in pari delicto*. Part performance of a substantial character would according to the decision in *Kearley v. Thomson*(1) suffice to prevent the plaintiff from recovering. In our opinion this is also the construction to be placed upon the words 'not carried into execution' in section 84, Indian Trusts Act.

Turning to the facts here, we do not find a case when a party to a fraudulent transaction relented before anything was done in pursuance of the intended fraud and the unlawful compact was in no way carried out. On the contrary the plaintiff when he

(1) L.R., 24 Q.B.D., 742.

(2) L.R., 15 Q.B.D., 561.

contested Shanmugam's claim did all he could to effectuate the fraud, and failed only, because Shanmugam was, fortunately for him, able to frustrate the attempt to injure him. For these reasons we dismiss the second appeal with costs.

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APPELLATE CIVIL.

Before Sir S. Subrahmaniam Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.

VAMA DAVA DESIKAR (DEFENDANT), APPELLANT,

v.

MURUGESA MUDALI (PLAINTIFF), RESPONDENT.*

1905.
July 11.

Rent Recovery Act (Madras) VIII of 1865—Limitation for suits under s. 40—Right of attachment when rent is payable in kind—Validity of attachment for arrears due under patta altered subsequently.

Section 40 of the Madras Rent Recovery Act must be read with section 51. The word "month" in the former was intended to be equivalent to the 30 days in the latter and suits under section 40 are within time if presented within 30 days.

Attachment proceedings under the Act may be taken when rent is payable in kind.

Where a patta under which an attachment was made, is altered, on appeal subsequently, the attachment cannot be upheld even to the extent of the rent in arrears under the altered patta.

Ramachandra v. Narayanasami, (I.L.R., 10 Mad., 229), not followed.

THE plaintiffs in these suits were tenants of the defendant. The defendant filed summary suits against the plaintiffs and obtained decrees directing the plaintiffs to accept varam pattas. On appeal by the plaintiffs it was held that the defendant was entitled only to money rent. Before the appeals were decided, the defendant, under the decrees directing varam pattas, instituted attachment proceedings under the Rent Recovery Act and notice of such attachment was served on the plaintiffs on 31st January 1903 according to the defendant and on 1st February 1903 according to the plaintiffs. The present suits were presented by the plaintiffs

* Second Appeals Nos. 2435 to 2441 of 1903, presented against the decree of A. C. Tate, Esq., District Judge of Chingleput, in Appeal Suits Nos. 128 to 134 of 1903, presented against the decision of H. L. Braidwood, Esq., Sub-Collector of Chingleput, in Summary Suits Nos. 10 to 12, 14, 15, 18 and 20 of 1903 respectively.

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under section 40 of the Act on 2nd March 1903 to set aside the attachment, *i.e.*, on the 30th day, according to the defendant's contention, after the attachment. The substantial questions were, whether the suits were barred by limitation and whether the attachments were valid to any extent.

The Head Assistant Collector decided that the suits were not barred but upheld the attachments. On appeal the District Judge also held that the suits were not barred but reversed the decrees on the ground that no attachment proceedings lay in the case of rent in kind.

Defendant preferred these second appeals.

V. Krishnaswami Ayyar for appellant.

The Hon. Mr. L. A. Govindaragava Ayyar for P. R. Sundara Ayyar for respondent.

JUDGMENT.—The District Judge is in error in holding that the attachment proceedings cannot be taken where the rent is payable in kind. The appeals however fail on other ground. We agree with the District Judge in holding that an appeal by way of a summary suit presented against an attachment under section 40 of the Rent Recovery Act (Act VIII of 1865) is within time if presented within 30 days. No doubt in section 40 the word used is "month." But that section must be read with section 51 which lays down that summary suits under the Act must be presented within 30 days. We think that the reasonable construction is to hold that the term month in section 40 was intended to be an equivalent to the period of 30 days as provided for in respect of all summary suits in section 51. It was next urged for the appellant that the attachment should be upheld to the extent of the rent actually in arrear in accordance with the pattas now upheld. This contention cannot be accepted. Under the recent Full Bench ruling the appellant has to tender a patta according to the final decision before he can proceed to enforce the terms of the tenancy. Therefore the ruling in *Ramachandra v. Narayanasami*(1) (assuming it has not been overruled by the Full Bench ruling referred to) cannot be held to apply. We must accordingly dismiss these second appeals with costs.

(1) I.L.R., 10 Mad., 229.

APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Boddam.*

PALANIYANDI PILLAI AND ANOTHER (PLAINTIFFS),
APPELLANTS,

v.

VEERAMMAL (FIRST DEFENDANT'S REPRESENTATIVE),
RESPONDENT.*

1905.
July 24.

Succession Certificate Act VII of 1889, s. 4—Certificate not necessary in so far as the decree is made enforceable against mortgaged property, but necessary so far as the decree imposes personal liability.

A decree for the enforcement of a mortgagee's rights as against the mortgaged property is not a decree for a 'debt' within the meaning of section 4 of Act VII of 1889; but it would be otherwise with reference to a personal decree for the debt, and a certificate will be a condition precedent to such a personal decree.

Fateh Chand v. Muhammad Bakhsh, (I.L.R., 16 All., 259), not followed.

SUIT by the plaintiffs as the heirs of one Akilandammal to recover the amount due on a mortgage bond executed by the first defendant in favour of Akilandammal. The plaintiffs had applied for a certificate under Act VII of 1889 to collect the debts due to Akilandammal which was dismissed on the opposition of the first defendant. The first defendant pleaded *inter alia* that the suit was not sustainable without a certificate under section 4 of Act VII of 1889. The District Munsif held that under the circumstances the suit was maintainable without a certificate and passed a decree containing an order for sale, and a personal decree against the first defendant for any balance that may remain after the sale.

The District Judge, on appeal, held that a certificate was necessary. The material portion of his judgment was as follows:—

The respondent's vakil relies upon the ruling of the Calcutta High Court in *Baid Nath Das v. Shamanand Das*(1), in which it was held that, when a decree was made for sale of property for the

* Second Appeal No. 501 of 1903, presented against the decree of L. G. Moore, Esq., District Judge of Trichinopoly, in Appeal Suit No. 6 of 1902, presented against the decree of M.R.Ey. S. Ramasami Ayyangar, District Munsif of Kulittalai, in Original Suit No. 186 of 1901.

(1) I.L.R., 22 Cal., 148 at p. 146.

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amount due under a *mortgage* bond but personal relief was not granted, this was not a decree against the debtor for payment of his debt within the meaning of section 4 of the Succession Certificate Act VII of 1899. The same point was considered by a Full Bench of the Allahabad High Court in the case of *Fateh Chand v. Muhammad Bakhsh*(1) and it was decided that section 4 of Act VII of 1889 did apply to suits for sale on a mortgage under section 88 of the Transfer of Property Act. It was pointed out "that a mortgagee who brings his suit for sale is bringing his suit against his debtor, and the decree which he seeks in that suit is a decree for payment of his debt by sale of the mortgaged property" and "that a mortgagor needs as much protection as any other debtor when sued for a debt by a person claiming to be entitled to the effects of his deceased creditor." I think that, in the absence of a definite ruling by the Madras High Court on the point which would be binding upon me, I am bound to follow the Full Bench ruling of the Allahabad High Court.

The plaintiffs preferred this second appeal.

T. Rungachariar for appellants.

V. Purushothama Ayyar for the Hon'ble. Mr. P. S. Sivaswami Ayyar for respondent.

JUDGMENT.—If in the present case the suit had been merely for an order for sale of the mortgaged property we should, following *Baid Nath Das v. Shamanand Das*(2), *Mahomed Yusuf v. Abdur Rahim Bepari*(3) and *Nan Chand v. Yenawa*(4), hold that no succession certificate would be necessary as pointed out on behalf of the appellants in *Ammanna v. Gurumurthi*(5); the inclination of the learned Judges who decided that case was in favour of the view that a decree for foreclosure need not be conditional upon the production of a certificate. *Fateh Chand v. Muhammad Bakhsh*(1), which dissents from the above view, distinguishes the case in *Ammanna v. Gurumurthi*(5) on the ground that the relief prayed for in the latter was foreclosure. This distinction would seem to be open to doubt for reasons stated by Dr. Ghose at pages 87 and 88 of his work on the 'Law of Mortgage' (3rd edition). In our opinion the better conclusion is that, irrespective of the actual description of relief granted, a decree for the enforcement of

(1) I.L.R., 16 All., 259.

(3) I.L.R., 26 Calc., 839.

(5) I.L.R., 16 Mad., 64.

(2) I.L.R., 22 Clac., 143 at. p. 148.

(4) I.L.R., 28 Bom., 630.

a mortgagee's rights as against the mortgaged property is not a decree for a *debt* within the meaning of section 4 of the Succession Certificate Act (VII of 1889). It would, however, be otherwise with reference to a personal decree for the debt, and this is conceded in the Calcutta and Bombay cases cited. In the present case, a personal decree was prayed for and granted, and the requisition of a certificate as a condition precedent to such a decree is right. We are unable to accept the suggestion made on behalf of the appellants that the decree of the lower Appellate Court warrants the view that the certificate is made a condition even with reference to so much of it as relates to the mortgaged property. The second appeal is therefore dismissed. In the circumstances each party will bear and pay his own costs.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Boddam.

MUTHUSAMI PILLAI (PLAINTIFF), APPELLANT,

v.

ARUNACHELLAM CHETTIAR AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Rent Recovery Act (Madras) VIII of 1865, ss. 1, 38, 39—Intermediate landholder tenant for purposes of ss. 38, 39.

An intermediate landholder liable to pay rent to a superior landlord is a tenant for the purposes of sections 38 and 39 of the Madras Rent Recovery Act VIII of 1865 and the opinion of the Full Bench in *Nallayappa Pillian v. Ambalavana Pandara Sannadhi*, (I.L.R., 27 Mad., 465 at p. 470), is not in conflict with this view. The true effect of the reference in section 38 to landholders specified in section 3 is to exclude landholders specified in the second paragraph of section 1 of the Act.

In a suit under sections 40 and 50 of Act VIII of 1865, it is not competent to the Revenue Court to decide the question of damages sustained by the tenant by non-performance by the landlord of covenants in the lease.

* Second Appeal No. 280 of 1904, presented against the decree of H. Moberly, Esq., District Judge of Madura, in Appeal Suit No. 255 of 1903, presented against the decision of J. R. Huggins, Esq., Head Assistant Collector, Ramnad, in Second Suit No. 18 of 1903.

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SUIT under sections 40 and 50 of the Madras Rent Recovery Act to set aside an attachment by the defendants for arrears under section 39 of the Act and for damages sustained by the plaintiff owing to the defendants not closing a channel as they were bound to do under the lease. The facts are sufficiently set out in the judgment. The suit was dismissed as likewise the appeal to the District Court.

Plaintiff preferred this second appeal.

K. N. Ayya for appellant.

T. Rangaramanujachariar for first respondent.

JUDGMENT.—The respondent is the manager of the Rameswaram Devastanam. The appellant is the lessee of a village forming part of the endowment of the Devastanam. The respondent proceeded under section 39 of the Rent Recovery Act (Act VIII of 1865) in respect of arrears of rent due for fasli 1311 under the terms of the lease. The legality of the distraint is impeached on behalf of the appellant and in support of his contention reliance is placed on the concluding portion of the opinion of the Full Bench in *Nallayappa Pillian and others v. Ambalavana Pandara Sannadhi*(1). No doubt the cases referred to in the passage have been over-ruled by that opinion so far as they proceed on the supposition that the word tenant as defined in section 1 of the Act is applicable to an intermediate landholder who has to pay rent to a superior landholder. We do not however understand this passage to lay down that an intermediate landholder bound to pay rent to a superior landholder, is not a tenant within the meaning of any of the other provisions of the Act as in effect contended for on behalf of the appellant. If that were the meaning of the Full Bench, there was no necessity for the guarded and qualified language used in the opinion, and the opinion itself would have been directly to the effect that intermediate landholders paying rent to superior landholders were not tenants for any purposes whatsoever under the Act. This certainly would have been the case as the prior Full Bench decision (*Lakshminarayana Pantulu v. Venkatrayanam*(2)) cited in the later opinion with approval explicitly proceeded on the footing that intermediate landholders, bound to pay rent to superior landholders, were tenants within the meaning of the Act for some purposes though not tenants within the meaning of section 3 thereof. We are

(1) I.L.R., 27 Mad., 465 at p. 470.

(2) I.L.R., 21 Mad., 116.

unable therefore to accept the argument that the respondent was altogether disentitled to take proceedings for the recovery of the rent due to the Devastanam under the Act. Nor do we see anything in the language of section 38 or 39 of the enactment to confine the operation of those sections to cases where the tenant proceeded against is a *cultivating* tenant to whom section 3 is applicable. Section 38 no doubt refers to *landholders* referred to in section 3, but the respondent here is undoubtedly such a landholder. The true effect of this reference in section 38 to landholders mentioned in section 3 is to exclude landholders falling under the second paragraph of section 1, namely, all holders of land under ryotwari settlement or in any way subject to the payment of land revenue direct to Government and all other registered holders of land in proprietary right from resorting to the remedy made available by sections 38 and 39.

We think the claim for damages set up by the appellant is not a matter to be considered in this litigation.

The second appeal fails and is dismissed with costs.

APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Boddam.*

ELUMALAI CHETTIAR (DEFENDANT), APPELLANT,

v.

NATESA MUDALIAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Rent Recovery Act (Madras) VIII of 1865, s. 9—Landlord and tenant—Right to issue putta for unassessed house-site.

It being common in this country to have trees in backyards forming part of unassessed house-sites, such a circumstance does not amount to a conversion of such site enjoyed free of rent into cultivated land for which rent is payable and no putta can be tendered in respect of such lands.

* Second Appeal No. 46 of 1904, presented against the decree of R. D. Broadfoot, Esq., District Judge of Chingleput, in Appeal Suit No. 17 of 1903, presented against the decision of M.R.Ry. P. Sivarama Ayyar, Deputy Collector of Tiruvallur, in Summary Suit No. 204 of 1902.

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CHELLAM
CHETTIAR.

1905.
July 25.

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The facts necessary for this report are set out in the judgment.

Mr. M. A. Tirunarayana Chariar for appellant.

K. P. Govinda Menon for S. Kasturiranga Ayyangar for respondents.

JUDGMENT.—The facts upon which the decision of this case depends are practically undisputed. The piece of land for which rent is claimed and a patta is tendered was unassessed poramboke land forming part of the gramamattam or village site. Prior to the purchase of the property by the defendant from the former occupant, there was a house on part of the land, the remainder being used as a backyard. The house came down, and since then the property has been in the occupation of the defendant under the purchase. It is not alleged that the defendant has raised any cultivation upon the land for which rent is ordinarily leviable. The District Judge talks of the land as being used as an orchard, this view being based upon the fact that there are a few trees on it including a mango and a margosa tree. The existence of such trees is quite common in backyards of houses in this country and such a circumstance cannot be treated as any evidence whatsoever of the conversion of the land occupied as house-site, free of rent, into cultivated land for which rent is payable. The plaintiffs were therefore not entitled to enforce the acceptance of a patta treating the land as liable to payment of rent. In this view it is unnecessary to consider the point raised on behalf of the defendant that, he having upon demand refused to pay any rent for the land since 1888, the plaintiffs are precluded from demanding rent for the land on his showing that the land was being used for a purpose not contemplated by the grant of poramboke land as house-site. We set aside the decree of the District Judge and restore that of the Deputy Collector with costs in this and in the lower Appellate Court.

APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.*

ORR AND OTHERS (DEFENDANTS), APPELLANTS,

v.

RAKKUMARATHI (PLAINTIFF), RESPONDENT.*

*Rent Recovery Act (Madras) VIII of 1865, s. 8—Landlord and tenant—
Insertion of unreasonable terms in patta.*

1905.
July 27.

Where a tenant disputes the validity of a transfer made by himself to a third party, it is not open to the landlord to recognise the rights of the transferee until the transferee establishes his rights in a way which is binding on the original tenant; and the insertion of words in the patta tendered to the tenant recognising the rights of the transferee will be unreasonable.

SUMMARY suit brought by the plaintiff a tenant to compel the defendants, who were her landlords, to tender a proper patta for the lands in her possession. The plaintiff alleged that the defendants fraudulently and without her consent transferred some of her lands to the patta of another tenant, Pattadar No. 57. The defendants pleaded that a proper patta was tendered and accepted by the plaintiff and that the lands alleged to have been transferred to another patta were so transferred, because such lands had passed to the other pattadar under a registered sale-deed by the husband of the plaintiff and under a sale in execution of a decree against him. The Assistant Collector found that the defendants had tendered a patta to the plaintiff in which the words 'sold to No. 57' were entered against the lands alleged to have been alienated. He held that the insertion of these words was reasonable and directed the defendants to tender the plaintiff a patta with the words inserted. On appeal the decree was modified and the words 'sold to No. 57' were ordered to be expunged from the patta.

Defendants preferred this second appeal.

The Hon. Mr. P. S. Sivaswami Ayyar for appellants.

The Hon. Mr. V. C. Desikachariar for respondent.

* Second Appeal No. 538 of 1904, presented against the decree of H. Moberly, Esq., District Judge of Madura, in Appeal Suit No. 214 of 1903, presented against the decision of J. R. Huggins, Esq., Head Assistant Collector of Ramnad, in Summary Suit No. 13 of 1903.

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RATHI.

JUDGMENT.—Admittedly the relation of landholder and tenant subsisted between the parties to the suit and even in these proceedings it is not the defendant's case that such relation has terminated. They tender a patta which implies the continuance of that relation. It is difficult to understand how they can insert in the patta words implying that any land or lands comprised therein belong not to the tenant but to another person, viz., Pattadar No. 57. To compel the plaintiff to accept such a patta would be to compel her to accept a document denying her right to the property. No doubt where there has been a transfer of a tenant's interest to a third party and the transfer is admitted by the parties concerned, it is competent to, and may be the duty of, the landholder to treat the transferee as the tenant; but where there is a dispute as to the transfer of the rights it is not competent to the landholder to determine the question for himself and refuse to grant patta to the party who was the tenant prior to the dispute. He is to proceed on the footing that the tenancy continues until the third party setting up the cessation of the tenancy establishes it in a way binding upon the original tenant. The appeal therefore fails, and is dismissed with costs.

APPELLATE CIVIL.

*Before Sir S. Subrahmaniam Ayyar, Officiating Chief Justice,
and Mr. Justice Benson.*

SRINIVASA RAO SAHEB AND OTHERS (DEFENDANTS
Nos. 1 to 7), APPELLANTS,

v.

YAMUNABHAI AMMALL AND OTHERS (PLAINTIFFS AND
DEFENDANTS Nos. 8 AND 9), RESPONDENTS.*

Transfer of Property Act IV of 1882, ss. 85, 96—Mortgage decree need not reserve rights admitted by all parties—Decree must be construed with reference to pleadings.

There is nothing in the provisions of the Transfer of Property Act, which requires that a decree in a mortgage suit should in terms reserve rights admitted

* Civil Miscellaneous Appeal No. 239 of 1904, presented against the order of K. C. Manavedan Raja, Esq., District Judge of North Arcot, in Civil Miscellaneous Petition No. 269 of 1904 in Execution Petition No. 16 of 1903 connected with Original Suit No. 11 of 1906.

by all the parties and order the sale to be subject to them, and section 96 of the Act does not militate against this view.

Quære, whether section 85 of the Act requires such persons whose rights are admitted to be made parties.

Where the decree omits to reserve such rights, it ought to be construed with reference to the admissions contained in the pleadings or made in the course of the case and ought not to be so construed as to grant a larger measure of relief than is prayed for or to negative rights admitted by all parties.

THIS appeal arose out of proceedings in execution of the decree in Original Suit No. 11 of 1900 in the District Court of North Arcot.

That suit was brought by respondents Nos. 3 and 4 on a mortgage bond executed by the first appellant and others. The eighth and ninth defendants (first and second respondents) were joined as they had a prior mortgage on the same properties. Their mortgage was admitted in the plaint and the defendants admitted the same in their written statements. The plaintiffs prayed for a sale subject to the eighth and ninth defendants' mortgage. The lower Court in its decree for sale, did not however expressly state that the sale was to be subject to the eighth and ninth defendants' mortgage. The first and second respondents applied to the lower Court under section 295 of the Code of Civil Procedure that the property might be sold free of their mortgage, they being given a first charge on the sale-proceeds. The Court passed the order prayed for.

Against that order defendants Nos. 1 to 7 preferred this appeal.

The Hon. Mr. L. A. Govindaragava Ayyar for V. Krishnaswami Ayyar, and S. Srinivasa Ayyar for appellant.

T. V. Seshagiri Ayyar for Sir V. Bhashyam Ayyangar, K. Varadachari for C. R. Tiruvengkatachariar and A. K. Madhava Rao for respondents.

JUDGMENT.—The first and second respondents hereinafter referred to as the respondents, were prior mortgagees of the property ordered to be sold by the lower Court. In the plaint in the case, the plaintiffs stated that they were subsequent mortgagees, that the respondents were impleaded as they held a prior mortgage and expressly prayed *inter alia* that in default of payment of the money due to them under their mortgage, the mortgaged property should be sold subject to the prior mortgage. The appellants who were the other defendants in the case being mortgagors or persons claiming through them also admitted in their written statement the prior mortgage in favour of the respondents. There was thus

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no matter in dispute either between the plaintiffs in the suit and the respondents or between the latter and their co-defendants. In this state of things the Court in giving the decree for sale in favour of the plaintiffs made no reservation therein in respect of the respondents' prior mortgage.

It was argued that in the absence of any such reservation in the decree, it is imperative on the Court to sell the property on the footing that the respondents' mortgage was non-existent and to apply the proceeds in payment of the plaintiffs' mortgage and pay the remainder to the mortgagors themselves.

Now section 85 of the Transfer of Property Act, no doubt requires all parties having an interest in the property comprised in the mortgage being included in any suit on the mortgage. It is open to doubt however whether a suit in which all the parties admit the existence of and intend to raise no question about a prior incumbrance in favour of a person not impleaded in the suit is liable to be dismissed as one framed in contravention of the section. Assuming that, even in such circumstances, section 85 requires the prior incumbrancer to be brought before the Court in the suit, we do not think that there is anything in the provisions of the Transfer of Property Act which requires that the decree in the suit should in terms reserve his rights and order the sale to be subject to them. Section 96 of the Act does not militate against this view. In laying down that, property subject to a prior mortgage may be sold by Court free from the same with the consent of the prior mortgagee the section does not necessarily imply that when the property is not to be sold free from such incumbrance the decree should under all circumstances expressly reserve the prior mortgagee's rights. No doubt where any contest arises between a puisne mortgagee-plaintiff and a prior mortgagee-defendant or a contest between a mortgagor and a prior mortgagee who are co-defendants which it is necessary to decide in order to give relief to the plaintiff, such contest should be adjudicated upon and the decree framed with reference to the adjudication. But where the right of parties to the suit such as the respondents is admitted on all hands and further the person claiming relief asks for relief subject to such admitted right, the Court would of course be going out of the way in granting larger relief than he prayed for; and indeed there is no necessity to construe the decree in the present case as granting what the plaintiffs themselves did not

ask. No doubt to avoid misconceptions the decree might have been in the terms of the prayer of the plaintiffs themselves, that is to say, the mortgaged property be sold subject to the prior mortgage in favour of the respondents. The proper course to be observed in drawing up a decree is certainly that pointed out in *Lachmi Narain v. Jwala Nath* (1) still, in construing a decree, admissions in the pleadings or in the course of the case should not be ignored and the decree taken as negating any right which was conceded by all parties, with reference to which the Court was not called upon to make any adjudication and in respect of which there was no necessity for the Court to make reference in terms in the decree, provided such a construction does not infringe any statutory provision. It was in consonance with this view that the plaintiffs, the subsequent mortgagees, consented to the sale taking place as applied for by the respondents and the sale-proceeds being applied, in the first instance, towards the discharge of the prior mortgage. The contention of the mortgagors is therefore on the face of it unsustainable.

We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Boddam.

RAMAKRISHNA RAJU AND OTHERS (PLAINTIFFS), PETITIONERS,

v.

KATTA VENKATASWAMY AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Trustee—Person not entitled obtaining renewal of a promissory note, trustee for rightful owner—Misjoinder of parties.

Where on the death of the payee of a promissory note executed by D, C becomes entitled to the amount, but A obtains a renewal from D in favour of B, a suit will lie by C against D, A and B as defendants to recover on the renewed note, as A and B in obtaining the renewal must be held in law to have become

(1) I.L.R., 18 All., 344 at p. 347.

* Civil Revision Petition No. 594 of 1904, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of M.R.Ry. T. A. Narasimha Chariar, District Munsif of Bhimavaram, in Small Cause Suit No. 370 of 1904.

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RAMAKRISHNA RAJU trustees for C. A and B are necessary parties and the suit will not be bad for misjoinder.

KATTA VEN. KATASWAMY. The only person entitled to object to C's claim will be D.

Suit by the plaintiff to recover the amount due on a promissory note executed by the first defendant in favour of the third defendant in renewal of a promissory note executed by the first defendant in favour of the deceased husband of the second defendant. The plaintiff claims that, as the undivided brother of the deceased, the right to recover the amount devolved on him by survivorship.

The Munsif held that the suit was bad for misjoinder and that the plaintiff had no right to sue on the renewed promissory note and dismissed the suit. Plaintiff presented this petition to the High Court under section 25 of Act IX of 1887.

The Hon'ble Mr. V. C. Desikachariar for petitioners.

T. V. Muthukrishna Ayyar for respondents.

JUDGMENT.—On the 10th January 1901, the first defendant borrowed Rs. 20 from an undivided brother of the plaintiffs and the husband of the second defendant. The first defendant gave him an on-demand promissory note for the Rs. 20 and interest at Rs. 1-9-0 per annum. The payee of the note died and behind the backs of the plaintiffs the second defendant got the first defendant to execute a fresh renewal note for Rs. 40, the amount of principal and interest on the 17th April 1903 in the name of the third defendant her mother and she returned the original note to the first defendant.

On the 24th June 1904 the plaintiffs sued all the defendants for the amount of the original loan and interest stating their claim as "for Rs. 44 being the amount due on a promissory note for Rs. 40 executed by the first defendant." The first defendant admitted that he had to pay the plaintiffs and that he was ready to do so. The second and third defendants raised several defences, e.g., limitation, misjoinder, etc. The Munsif dismissed the plaintiff's suit holding that the suit was not maintainable, was barred and was bad for misjoinder.

The plaintiffs' real claim was that the renewal note though in the name of the third defendant was a renewal of the original note which was a note due and payable to an undivided member of the family and therefore due to them on his death. In obtaining the renewal in the name of the third defendant, the second defendant and the third defendant must be taken to have become trustees

for the plaintiffs and that the third defendant was only a benami payee for them and therefore they were entitled to sue. The plaintiffs were entitled to sue the first defendant and to claim that in giving the note in the name of the third defendant he intended and in law did, in fact, renew the note to whoever was his creditor and that the third defendant's name was intended merely as the ostensible creditor and he alone was entitled to dispute the plaintiff's right to sue him upon it. The second and third defendants were properly joined in order that the plaintiffs might prove their case and that the decree might bind them. There was no misjoinder, nor was the action one that could not be sustained, nor was it barred. I set aside the decree of the District Munsif and remand the case for disposal according to law. Costs will abide and follow the event.

APPELLATE CRIMINAL.

Before Mr. Justice Boddam and Mr. Justice Moore.

SUPPA TEVAN AND OTHERS (PRISONERS), APPELLANTS,

v.

EMPEROR, RESPONDENT.*

1905.
July 19.

Penal Code—Act XLV of 1860, s. 193—'Judicial proceeding'—Oaths Act I of 1873, ss. 4, 5—Criminal Procedure Code—Act V of 1898, s. 164—Magistrate empowered to administer oath when taking statements under s. 164 of the Criminal Procedure Code.

A Magistrate taking statements under section 164 of the Code of Criminal Procedure is acting in discharge of duties imposed on him by law and is empowered to administer an oath under sections 4 and 5 of the Oaths Act. An investigation under Chapter XIV of the Code of Criminal Procedure is a stage of a judicial proceeding and a person making on oath a false statement in the course of such investigation commits an offence under section 193 of the Penal Code.

Queen-Empress v. Alagu Kone, (I.L.R., 16 Mad., 421), followed.

In the course of an investigation under Chapter XIV of the Code of Criminal Procedure, by the Station-house Officer of Bodinayakanur in a case of alleged murder, the Sub-Magistrate of Uthamapalayam, under section 164 of the Code of Criminal

* Criminal Appeals Nos. 142 to 144 and 147 of 1905, presented against the sentences of H. Moberly, Esq., Sessions Judge of Madura, in case No. 3 of the Calendar for 1905.

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Procedure, took statements on oath from the accused which implicated the first prosecution witness in the murder. The result of the investigation was that the charge against the first prosecution witness was thrown out as false. Sanction was subsequently given to prosecute the accused for having given false evidence in making statements to the Magistrate that they had seen the first prosecution witness murder the deceased.

The Sessions Judge convicted them of offences under section 193 of the Penal Code.

The accused preferred this appeal.

Mr. John Adam and K. N. Ayya for appellants.

The Public Prosecutor in support of the conviction.

JUDGMENT.—The first ground of appeal is that the Sub-Magistrate of Uthamapalayam when taking down statements under section 164, Criminal Procedure Code, was not authorized to administer an oath to the persons examined by him. Following the decision in *Queen-Empress v. Alagu Kone*(1), we hold that he was so entitled. The Sub-Magistrate is a Court and when he took down statements under this section he was acting in discharge of a duty imposed on him by law and was consequently under section 4, Act X of 1873, authorized to administer an oath. The appellants were persons to whom an oath might be administered, because they were persons who could lawfully be examined by the Sub-Magistrate under section 164, Criminal Procedure Code (*vide* section 5, Oaths Act). It is further urged that the conviction of the appellants under section 193 of the Penal Code was not legal. In the face of the provisions of the explanation attached to that section we cannot accept this contention. An investigation under Chapter XIV of the Criminal Procedure Code is a stage of a judicial proceeding and therefore when the appellants made on oath statements which they knew to be false before the Magistrate conducting that investigation they gave false evidence (*vide* illustration appended to explanation 2) and committed an offence under section 193, Penal Code.

On the merits we are satisfied that the appellants have been rightly convicted. The sentences are not too severe. These appeals are dismissed.

(1) I.L.R., 16 Mad., 421.

APPELLATE CRIMINAL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
Mr. Justice Boddam and Mr. Justice Sankaran Nair.*

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v.

CHELLAN AND OTHERS.*

1905.
August 29,
September
7, 25.

Criminal Procedure Code—Act V of 1898, s. 307—Procedure of High Court on reference under—'Opinion' of jury, what is.

Where the Sessions Judge disagreeing with the jury, refers a case to the High Court under section 307 of the Code of Criminal Procedure, the High Court is to form its own opinion on the evidence. The 'opinion' of the jury in section 307 of the Code of Criminal Procedure is the conclusion of the jury, and not the reasons on which that conclusion is based.

Per Sir SUBRAHMANIA AYYAR, Officiating Chief Justice, and BODDAM, J.—In references under section 307 of the Code of Criminal Procedure, although it may be expedient to have before the Court the reasons of the jury for the view taken by them, when any have been given, the circumstance that no such reasons have been ascertained does not warrant this Court to decline to go into the evidence and to arrive at its own judgment, after giving due weight to the views taken by the Judge and the jury as to the guilt or innocence of the accused.

THIS was a reference by the Sessions Judge of Salem under section 307 of the Code of Criminal Procedure. The letter of reference is as follows :—

The jury return an unanimous verdict that accused Nos. 1 to 4 are guilty and the others are not. I agree in and accept the verdict in so far as accused Nos. 1 to 4 are held to be guilty and in so far as the eighth accused is held to be not guilty. As regards the eighth accused in addition to the fact that his village was not named, there may be a doubt as to the possession of the item of cloth by him, and there is the circumstance that prosecution thirteenth witness admits that his niece was taken away by this accused's son from which it may be suspected that he has been identified owing to some enmity. In his case also, therefore, I do not want to differ from the jury, and respecting their opinion, I accept it. But I regret that, as regards accused Nos. 5, 6 and 7, I cannot agree with them. The same witnesses that speak about accused Nos. 1 to 4 speak about these accused also. In fact

* Criminal Reference No. 7 of 1905 made by S. Gopalachariar, Esq., Sessions Judge of Salem Division, in Calendar Case No. 65 of 1905.

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the fifth and seventh accused are identified by no less than five witnesses while the sixth is identified by at least three. The village of accused Nos. 5 and 6 has been named in all the complaints and is close to that of accused Nos. 1 to 4 and to the scene of occurrence. Even bearing in mind the fact that no property was found with fifth accused and even doubting the possession of the *mull* by the sixth accused, I see no reasonable grounds for differentiating the case of accused Nos. 5 and 6 from that of accused Nos. 1 to 4, in so far as the direct evidence goes, except that these were arrested not that very night but subsequently. This difference ought not to count for much. As regards the seventh accused, his own village is no doubt at some distance, but he appears to have no settled abode and he admits having come near the place some days afterwards and further admits being in possession of one of the items which he has not proved to belong to him, and which upon the evidence of prosecution fourth witness I hold to be stolen property. There is no particular reason for foisting on him the female's cloth only of the two items. For these reasons I feel bound to refer to the High Court the case of accused Nos. 5, 6 and 7 who will be on remand till final orders are passed.

I acquit eighth accused and direct his release. I sentence each of accused Nos. 1, 2, 3 and 4 to six years' rigorous imprisonment. Prosecution witness Nos. 1 to 7 were not stray travellers. They were returning from their place of business, and, if robbers are to waylay such persons, trade will be paralyzed and great discomfort and uneasiness to the villagers will be caused. I therefore sentence them for a year in excess of what I used to do in ordinary dacoity cases.

I have to add that the seventh accused has been previously sentenced to three months' rigorous imprisonment by the Second-class Magistrate of Pennagaram on 19th October 1904 for offences under sections 457 and 380 of the Indian Penal Code in Calendar Case No. 153 of 1904.

The reference was heard before Davies and Benson, JJ., along with the appeal by the accused Nos. 1 to 4, whom the Sessions Judge, agreeing with the jury, had convicted.

The Public Prosecutor in support of the reference.

BENSON, J.—The appellants are the first four accused in Sessions Case No. 65 of 1905. They have been found guilty by

a jury on legal evidence and I can find no misdirection in the Judge's charge to the jury.

The jury has acquitted four other persons, who were charged with accused Nos. 1 to 4. The Sessions Judge has accepted the verdict in the case of the eighth accused for reasons stated by him, but he has referred the case of the fifth, sixth and seventh accused for the orders of this Court under section 307 of the Criminal Procedure Code, as he disagreed with the finding of the jury that they were not guilty. The Sessions Judge states that he is of opinion that these three accused are guilty of dacoity and has recorded the grounds of his opinion as required by law.

It is therefore necessary for us now to consider the entire evidence and, after giving due weight to the opinions of the Sessions Judge and the jury, to either convict or acquit these accused.

[His Lordship then proceeded to discuss the evidence.]

In this state of the evidence, I agree with the Sessions Judge that the guilt of accused Nos. 5, 6 and 7 is established beyond reasonable doubt. There is no record of the reason or reasons why the jury was of opinion that they were not guilty. The law does not require them to give reasons, nor does it empower the Judge to ask them their reasons, though he is empowered to question them in order to ascertain what their actual verdict is, and it is also open to the jury to state their reasons if they desire to do so. In many cases they do this.

It has always, so far as my experience goes, been the invariable practice of this Court to accept a reference like the present under section 307 and to deal with the evidence against the accused, treating the so-called verdict of the jury as their 'opinion' referred to in this section. I have examined the records of all the cases referred under section 307 during the past three years. Their number is 73. I find that in 22 of these the reasons for the verdict of the jury have been recorded or are referred to by the Judge in his letter of reference. But in the remaining 51 cases, there is no record of the reasons, and no reference thereto by the Judge. There is nothing but the bare verdict, yet in not one of these cases did the High Court call on the Judge to ascertain the reasons of the jury or refuse to deal with the reference owing to the absence of such reasons. In all these cases the High Court dealt with the reference on the merits

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and acquitted or convicted the accused. Every Judge now in the High Court and also the Chief Justice, who is on leave and Sir Bhashyam Ayyangar and Russell, JJ. (now retired) took part in one or more of these cases. I am of opinion that the practice is correct.

When the Judge resolves to act under section 307 he is required by law not to record any verdict either of acquittal or conviction. The so-called 'verdict' does not bind him. It becomes for all legal purposes a mere opinion, and this, I take it, is what section 307 refers to when it speaks of the 'opinion' of the jury. In the present case I think that their 'opinion' that the fifth, sixth and seventh accused are not guilty is wrong. I would convict each of these accused Chellan (son of Mari), Karuran, and Venkatraman, and pass on them the same sentence as that passed on the accused Nos. 1 to 4 whom the jury found guilty, viz., six years' rigorous imprisonment.

DAVIES, J.—I agree with my learned colleague that this appeal (Criminal Appeal No. 319 of 1905) should be dismissed.

In this case the jury have unanimously found four out of the eight persons, charged with dacoity, guilty, and the appeal of these persons has been dismissed by us. The jury found the others, viz., four persons not guilty of the dacoity.

The Sessions Judge agreed with the jury that one of these four persons was not guilty, but he has dissented from their verdict in regard to the three other men and referred their cases under section 307 of the Code of Criminal Procedure, for our decision.

Our duty under clause 3 of that section is not only to consider the entire evidence, but also to give due weight to the opinions of the Sessions Judge and of the jury. The opinions of the jury cannot mean their verdict, for that is not a mere opinion nor is it styled as such as the opinions of assessors are. The verdict is a final judgment by the jury as to the guilt or otherwise of the persons charged before them, and it is binding on the Judge, while 'opinions' are not so. Besides, it is obvious from the provisions of the Code that the opinions of the jury referred to in clause (3) of section 307 are to be on the same par as those of the Judge, that is, opinions given after the verdict, for the jury are not enabled to pass opinions before their verdict. It is not until after the verdict is delivered and the Judge disapproves of it, that the

jury's opinions are required for submission to this Court to be considered along with the Judge's opinions.

Now, the opinions of the jury in this case are not before us. Apparently the Judge has not taken them, it may be, because no express provision is made to that end. But the legislature in directing that this Court should duly weigh the opinions of the jury gives an implied authority for the taking of such opinions. And the Sessions Judge is advised in future to do so before referring a case under section 307 of the Criminal Procedure Code.

It is now too late to direct such an opinion to be recorded in the case before us. And in the absence of such opinions, we cannot perform the functions, specially cast upon us, of duly considering them. In this particular case, where the Judge agreed with the verdict of the jury as regards five persons out of eight, it requires the most potent arguments to show that their verdict in the case of the other three persons was perverse. I have little doubt that the jury could have given reasons in support of their verdict if they had been asked for them, at least as strong as those given by the Judge against it.

In these circumstances I am not prepared to give any weight to the one-sided opinions of the Judge. And I consider that the verdict of the jury upon the evidence before them should be upheld. The three accused in whose case the reference has been made, that is, the fifth, sixth and seventh prisoners, should therefore be acquitted and their release ordered.

The reference again came on for hearing under the provisions of section 429 of the Code of Criminal Procedure before the Bench constituted above, in consequence of the difference of opinions between Davies and Benson, JJ., the Court delivered the following

JUDGMENT—Sir S. SUBRAHMANIA AYYAR, Offg. C.J., and BODDAM, J.—The ordinary dictionary meaning of the word 'opinion' in law is "the formal decision of a Judge, an umpire, a councillor or other party officially called upon to consider and decide upon a difficulty or dispute." The term, so far as we are aware, is not used to denote the *reasons* for the decisions themselves and we see nothing in the language of clause 3 of section 307 of the Criminal Procedure Code, to take the word 'opinions' in it to mean other than the respective conclusions of the jury and the Judge. The use of the word 'opinions' in the

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clause in preference to the term verdict was probably owing to the conclusion of the jury in the circumstances lacking the effect which would attach to it if there were no difference between the jury and the Judge in the matter. The first paragraph of section 307 itself is practically conclusive in favour of this view, as there, 'opinion' is used in contradistinction to the 'grounds' for such opinion. Section 305 of the Code also supports 'the same view.' It provides *inter alia* for cases of disagreement in trials in High Courts and the expression employed there too is 'opinion.' The context of course precludes the word being understood as meaning the grounds for the conclusion instead of the conclusion itself. Now it is conceded that when the Judge and the jury agree the latter cannot be compelled to give reasons for their decision. And section 303 which permits questions to be put to the jury in order to ascertain what their verdict is, negatives by implication a power on the part of the presiding Judge to question them otherwise. First to assume that the word 'opinion' in section 307, clause 3, means the reasons for the conclusion and next on such assumption to argue that the Code authorises the Judge in such cases to compel the jury to give them is not a legitimate mode of construction. The practice of the Court as shown by a large number of cases in which some or other of all the Judges of this Court have taken part and in which they proceeded to decide the references, though no reasons for the conclusion of the jury were elicited and submitted, is in accordance with the view we are taking. It follows therefore that, expedient as it may be to have before this Court, when any have been given, the reasons of the jury for the view taken by them in a particular case, the circumstance that no such reasons have been ascertained does not warrant this Court to decline to go into the evidence and to arrive at its own judgment after giving due weight to the views taken by the Judge and the jury as to the guilt or innocence of the accused.

[Their Lordships then discussed the evidence.]

Differing from the jury we convict the fifth, sixth and seventh prisoners and sentence them each to six years' rigorous imprisonment.

SANKARAN NAIR, J.—The learned Judges who first heard this reference have differed in their opinion. Mr. Justice Davies holds that it requires powerful reasons to show that the jury's verdict,

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upheld with reference to five of the accused is perverse with reference to the other three and as their opinion for their conclusion which he considers to be distinct from their verdict is not before us, it is impossible to say they are wrong upon the one-sided opinion of the Judge alone, the Code requiring us to give due weight to the opinion of the jury; Mr. Justice Benson holding that the verdict is their opinion came to the conclusion that on the evidence the accused are guilty. I concur with the Officiating Chief Justice and Boddam, J., in holding that once the case is referred to the High Court under section 307 we have to form our own opinion on the evidence. [After going into the evidence, his lordship agreed with the jury and acquitted the accused.]

APPELLATE CRIMINAL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.*

ARUNACHELLAM CHETTIAR, PETITIONER,

v.

CHIDAMBARAM CHETTI, RESPONDENT.*

1905.
July 18.

Criminal Procedure Code—Act V of 1898, s. 147—Construction of the words "concerning any land"—Landlord and tenant—Right of tenant to enclose cultivable land by a wall.

The enclosing by a tenant of cultivable lands by a wall instead of a hedge is not *prima facie*, an interference with the landlord's rights and ought not to be interfered with under section 147 of the Code of Criminal Procedure by a Magistrate, being a matter to be settled by a Civil Court. In such cases, if a breach of the peace is apprehended, security must be taken from the party in possession.

The words "concerning the use of land" in section 147 of the Code of Criminal Procedure cannot be qualified and the section construed as if it contained words that the user to which the dispute relates is a user by a party other than the party in possession.

The Empress v. Ganapat Kalwar, (4 C.W.N., 779), not followed.

Subba v. Trincal, (I.L.R., 7 Mad., 461), referred to and followed.

* Criminal Revision Petition No. 75 of 1905, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of A. Thompson, Esq., Sub-Divisional First-class Magistrate of Ramnad Division, in Miscellaneous Case No. 29 of 1904.

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THE facts necessary for this report are set out in the judgment of the High Court and the proceedings of the Sub-Divisional Magistrate.

On an application by the petitioner (counter-petitioner in the High Court) to the Sub-divisional Magistrate, the Magistrate issued notice to the counter-petitioner under section 147 of the Code of Criminal Procedure and passed the following order:—

“In this case I do not see how proceedings can rightly be initiated under section 147, Criminal Procedure Code. The question is as to the use of a piece of land which one party says that he has a right to build on, while the other party denies, that he (the first party) has such a right. Such a case is clearly not contemplated by section 147 of the Code. Nor are the facts such that proceedings can be taken under section 145 as there is no dispute as to the right of possession. No further proceedings will therefore be taken.”

The counter-petitioner applied to the High Court to revise the proceedings under sections 435 and 439 of the Code of Criminal Procedure.

The Advocate-General (Hon. Mr. J. P. Wallis) and S. Srinivasa Ayyangar for petitioner.

T. Rangachariar and K. N. Ayya for respondent.

ORDER.—The allegation of the petitioner was that the counter-petitioner, who was for the purposes of this petition treated as being in possession of a certain plot of land, was erecting a compound wall in the place of a hedge which existed before; that his consent had not been obtained for the erection, and that the object of the counter-petitioner's building a wall was to annex it to his house, while it was cultivable land subject to payment of assessment to him. The contention on the other side was that it was part of the counter-petitioner's property and that he was replacing an old dilapidated wall. The dispute, thus, in truth, is whether the property belongs to the counter-petitioner as alleged by him. If his allegation be true, it would be quite competent to him to raise the wall without any let or hindrance on the part of the petitioner. Even if it were otherwise, the fact that a tenant encloses agricultural land in his occupation with a wall instead of a hedge would not *primâ facie* interfere with the landlord's right. In these circumstances the case is one in which we ought not interfere in revision, as the dispute is really a civil dispute between the parties,

which ought to be settled by Civil Courts. We accordingly dismiss the petition. In doing so, we do not wish to be understood as concurring in the view expressed by the Magistrate if he meant to decide the general question as to the scope of section 147 of the Criminal Procedure Code, the words concerning the use of any land cannot, we think be altogether qualified and the section construed as if it contained words that the user to which the dispute relates is a user by a party other than the person in possession. We should hesitate before we accept the restricted construction suggested in *The Empress v. Ganapat Kalwar*(1) to which our attention has been drawn on behalf of the counter-petitioner. The case of *Hari Mohun Thakur v. Kissen Sundari*(2) and the observations in *Subba v. Trinca*(3) seem opposed to the view adopted in *The Empress v. Ganapat Kalwar*(1) if we understand it rightly. These cases were no doubt decided under the section of the repealed Criminal Procedure Code, the language of which is not identical with that of section 147 of the present Criminal Procedure Code, the alteration in the language seems intended rather to enlarge the scope than restrict it. It is perhaps not superfluous to observe that in cases like the present as pointed out in the case last cited (*Subba v. Trinca*(3)), the proper course was for the Magistrate to take security from the party from whom a breach of the peace was apprehended, though it is not illegal for the Magistrate to act under section 147.

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(1) 4 C.W.N., 779.

(2) I.L.R., 11 Calc., 52.

(3) I.L.R., 7 Mad., 461.

APPELLATE CRIMINAL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Boddam.*

1905.
September
19, 20.

SURYANARAYANA ROW AND ANOTHER (PETITIONERS IN
CRIMINAL REVISION PETITION No. 34 OF 1905),
BALA RAMAYYA (PETITIONER IN CRIMINAL REVISION PETITION
No. 35 OF 1905),

v.

EMPEROR (RESPONDENT IN BOTH).*

*Criminal Procedure Code Act V of 1898, ss. 476, 485, 489—Power of High Court
to interfere in proceedings under s. 476—Madras Act III of 1869, scope of—
Judicial Proceedings—Pleader, propriety of imputations made by.*

The High Court has power to revise proceedings under section 476 of the Code of Criminal Procedure when such proceedings are null and void for want of jurisdiction.

Erankoli Athan v. King Emperor, (I.L.R., 26 Mad., 98), referred to and distinguished. Madras Act III of 1869 does not authorise the issuing of summons in a departmental inquiry for bribery.

The pendency of an appeal by the accused, who had paid the fine imposed on him, would not give any Court authority or power to arrest him or to take recognizances from him for appearing at any further enquiry.

The presenting of a petition imputing improper motives to a Magistrate who is illegally detaining a person to take recognizances from him to enforce his attendance for the foregoing purpose will not justify any action by such Magistrate under section 476 of the Code of Criminal Procedure as the offence is not committed in the course of a *judicial proceeding*, nor is it brought to his notice in the course of such proceeding.

THE facts necessary for this report are fully set out in the judgment.

Dr. S. Swaminadhan and V. Krishnaswami Ayyar for petitioners.
The Public Prosecutor for respondents.

ORDER—In Criminal Revision Cases Nos. 34 and 35 of 1905.—
The material facts bearing upon these revision cases are shortly

* Criminal Revision Petition Nos. 34 and 35 of 1905, presented under sections 485 and 489 of the Code of Criminal Procedure and section 15 of the Charter Act, praying the High Court to revise the order of M.R.Ry. P. Nagesa Rao, Deputy Magistrate, Head-quarter Division, Kistna District, in his proceedings dated 21st December 1904 (*vide* Referred Conviction No. 5 of 1905 and Criminal Miscellaneous Petition No. 339 of 1905).

as follow: Bala Ramayya, the petitioner in Criminal Revision Case No. 35 of 1905, had been convicted on a charge of theft and sentenced to pay a fine of Rs. 20 which he paid (see Criminal Revision Case No. 36 of 1905). He preferred an appeal against that decision which was heard by the Deputy Magistrate Mr. P. Nagesa Rao in July 1904. The Deputy Magistrate directed the Sub-Magistrate who tried the case in the first instance to record further evidence. While the matter was thus pending a complaint of bribery in connection with the theft case made by Bala Ramayya against the Sub-Magistrate to the District Magistrate was being enquired into departmentally. Part of the departmental enquiry was being made by Mr. Nagesa Rao. On the 6th October Mr. Nagesa Rao summoned Bala Ramayya to appear before him on the 19th idem in connection with the departmental enquiry. Bala Ramayya did not appear, and Mr. Nagesa Rao thereupon issued a warrant for his arrest. The warrant was not executed as Bala Ramayya was reported to be not forthcoming. On the 3rd December 1904 Bala Ramayya came to the Court of the Deputy Magistrate on some other business. Then Mr. Nagesa Rao directed him to execute two recognizances and pending their execution he was detained by the Deputy Magistrate's peon. One of the recognizances was for Bala Ramayya appearing before the Sub-Magistrate on the 12th in connection with the additional evidence ordered to be taken, and the other for his appearance before Mr. Nagesa Rao himself on the 13th idem. Bala Ramayya at first refused to execute these recognizances protesting that he should not be called upon to do so and in support of his objection he got the petitioners in Criminal Revision Case No. 34 of 1905, one a High Court Vakil and the other a First-grade Pleader, to present a petition in which it was prayed that Bala Ramayya might be released without any security or recognizance being taken from him. As Mr. Nagesa Rao had, before this petition was presented, left the Court-house, his work in Court being over, and gone to his residence, the petition was handed to Mr. Nagesa Rao there. As in spite of the petition recognizances were insisted on Bala Ramayya executed them and thereupon these same vakils presented a further petition to Mr. Nagesa Rao (also in his house) in which they repeated their objections and prayed that the security and recognizances taken should be cancelled and Bala Ramayya released. This request was not

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complied with. With reference to paragraph 6 of the petition which runs as follows:—

"The petitioner believes that this Court namely M.R.Ry. P. Nagesa Rao Pantulu Garu is actuated by malice pure and simple against this petitioner in arresting him and detaining him unlawfully in custody from about 11-30 A.M. till about 4-30 P.M. this day." Mr. Nagesa Rao directed (purporting to act under section 476 of the Criminal Procedure Code) Bala Ramayya's two vakils to be prosecuted before the Divisional Magistrate for an offence under section 228 of the Indian Penal Code, viz. "intentionally offering an insult to a public servant whilst such public servant was sitting in a stage of a judicial proceeding" and Bala Ramayya for abetting them in committing this offence. The Public Prosecutor took the preliminary objection that these revision petitions did not lie with reference to the Full Bench ruling in *Eranholi Athan v. King Emperor*(1). We overrule the objection inasmuch as in our opinion Mr. Nagesa Rao was acting entirely without jurisdiction in the matter. Now as to the departmental enquiry he was holding it was purely an executive matter. Our attention has not been drawn to any provision of law empowering Mr. Nagesa Rao to compel the attendance of Bala Ramayya before him in connection with the enquiry. Of course it was not a case to which the Act regarding the issue of Revenue Summonses Madras Act III of 1869 applied and it follows that the issue of a warrant for Bala Ramayya's non-attendance in pursuance of the summons was a void proceeding. As regards also the matter of further evidence directed to be taken before the Sub-Magistrate it was not competent to Mr. Nagesa Rao to compel the attendance of Bala Ramayya either before the Sub-Magistrate or before himself. As we observed in Criminal Revision Case No. 36 of 1905 it was for Bala Ramayya, if he chose, to appear at the enquiry or not. It is to be remembered that he had been sentenced to pay a fine and the fine had been paid. The pendency of an appeal preferred by him would not give any Court authority or power to arrest him. The only result of the appeal could be either the reversal or confirmation of the sentence already passed. There was no question of enhancement of sentence. Of course to warrant an order under section 476 of the

(1) I.L.R., 26 Mad., 98.

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Criminal Procedure Code directing a person to be prosecuted the offence stated to have been committed by him should have been committed before the Court in the course of a judicial proceeding or should have been brought under its notice in the course of such a proceeding. Neither is the case here. For the presentation of the petition in question was in regard to and in the course of the detention of Bala Ramayya and the taking of recognizances from him both of which were, as shown above, absolutely illegal acts.

The Full Bench ruling relied on by the Public Prosecutor cannot possibly be held to apply to a case like the present. It is equally clear that Mr. Nagesa Rao was not at the time the petition was handed to him a public servant *sitting in any stage of a judicial proceeding* and this the Public Prosecutor conceded.

The order of Mr. Nagesa Rao directing the prosecution of the Pleaders and Bala Ramayya is hereby set aside.

We cannot help observing that the conduct of Mr. P. Nagesa Rao in detaining Bala Ramayya under the circumstances and compelling him to find security and execute the recognizances has been throughout so high handed and perverse as almost to justify (if that were possible) the statement in the paragraph of the petition complained of, though we cannot permit any legal practitioner to impute improper motives or corruption to a judicial officer in petitions addressed to him in connection with proceedings pending before him as such officer.

In Referred Case No. 5 of 1905 and Civil Miscellaneous Petition No. 339 of 1905.

As regards Referred Case No. 5 of 1905 and Civil Miscellaneous Petition No. 339 of 1905 it is needless to say that we entirely agree with Mr. Bell that a Pleader cannot be permitted to make imputations on judicial officers in petitions presented to them. The proper procedure in cases where such petitions are presented would be to return them to the Pleader for amendment or to reject them as scandalous. For reasons however given in our judgment in Criminal Revision Nos. 34 and 35 of 1905 these are not cases calling for any further action.

APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.*

1905.
September 6.
October 2.

GOVINDASAMI NAIDU AND ANOTHER (PLAINTIFFS), APPELLANTS;

v.

ALAGIRISAMI NAIDU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Compromise—Compromise presented but not decreed—Order to proceed with suit puts an end to such compromise—Procedure in sanctioning compromise on behalf of minors.

Where a compromise had been presented but no decree had been passed in accordance with its terms, and the Court subsequently, at the instance of one of the parties, ordered the suit to be proceeded with on the issues framed before the compromise and on other issues, the compromise must be deemed to have been put an end to, and the Court cannot, at a subsequent stage, treat the compromise as subsisting and proceed to pass a decree upon it.

In sanctioning compromises on behalf of minors, the order should state in terms that the question whether the compromise was for the benefit of the minors was considered.

Suit by the first plaintiff on behalf of himself and as guardian of his minor son, the second plaintiff, for partition of joint properties belonging to the plaintiffs and the first and second defendants; for an account, etc.

The facts necessary for this report are set out in the judgment.

Mr. C. Krishnan for appellants.

Mr. Joseph Satya Nadar for third and fourteenth respondents.

V. Krishnaswami Ayyar and C. V. Krishnaswami Ayyar for first and second respondents.

JUDGMENT.—We agree with the first of the contentions urged on behalf of the appellants—plaintiffs—that when the Subordinate Judge proceeded to pass an order on the compromise upholding it, it was not competent for him to do so having regard to what had happened in the suit between the presentation of the compromise and the said order upholding it. The application for leave to enter into the compromise on behalf of the minor, the second plaintiff, on the terms set forth in the compromise was made on the 9th January 1902 and sanction was granted on the same day.

* Appeal No. 3 of 1903, presented against the decree of M.R. B. Camaran Nair, Subordinate Judge of Tuticorin, in Original Suit No. 28 of 1901.

There was thus, no doubt, nothing to prevent the compromise being at once followed by a decree so far as the plaintiffs were concerned. But no decree according to the compromise was then passed. On the 7th February 1902, the second defendant, brother of the first plaintiff, who was entitled to a share under the compromise though he had not signed the compromise, presented a petition to the Court to set aside the order declaring him *ex parte* and to allow him to put in a written statement with reference to his claim. In this petition he urged that the compromise put in was not in accordance with the decision of the mediators who had settled the differences between the parties out of Court. The petition stood over until April when the Subordinate Judge held an enquiry into the matter, set aside the order declaring the second defendant *ex parte*, and directed the suit to be posted for trial on the merits with reference to the issues raised before the mediation took place and the compromise was entered into, as well as certain additional issues framed with reference to the written statement filed by the second defendant after he was allowed to put in his defence.

This necessarily involved the view that the compromise sanctioned on behalf of the second plaintiff and entered into on behalf of both the plaintiffs was at an end, and upon this view both the parties proceeded until August when the first defendant got the second defendant to accept the compromise which he had refused to do before. But the first plaintiff was at this time unwilling to act upon the compromise on the ground that the existence of outstandings due to the family to the extent of Rs. 16,000 had been withheld from the knowledge of the mediators; that the terms of the compromise were consequently unfair; and that he was therefore not prepared to validate it by giving a fresh consent to its being accepted and acted upon. The Subordinate Judge however directed that a decree be drawn up in accordance with the compromise, proceeding on the assumption that it remained open to him at that stage to treat it as one subsisting between the parties thereto and requiring only a formal order of the Court for a decree in accordance therewith to be passed. In other words, he overlooked the effect of his previous proceedings which amounted to a rejection of the compromise as the basis of a decree. In this view it is not necessary to consider whether the Subordinate Judge should not have allowed the appellants an opportunity of proving their allegation that the compromise was obtained by wilful

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suppression of a material fact from the mediators and the plaintiffs by the first defendant, the managing member of the family.

We wish to point out that in sanctioning a compromise on behalf of an infant the order granting the sanction should in terms state that the question whether the compromise was for the benefit of the infant was considered. The Court should also ascertain and record that in the opinion of the pleaders, if any, representing the infant, the compromise was one entered into in the interests of the minor and fit and proper to be sanctioned. See *Kalavati v. Chedi Lal*(1), *Virupakshappa v. Shidappa and Basappa*(2) and *In re Birchall Wilson v. Birchall*(3).

The order passed in this case on the 9th January sanctioning the compromise does not satisfy these conditions.

We set aside the decree of the Subordinate Judge and remand the suit for disposal according to law. Costs will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Subrahmanya Ayyar and Mr. Justice Benson.

1905.
October
24, 25, 26,
30, 31.

CHIDAMBARAM CHETTIAR AND OTHERS (DEFENDANTS Nos. 2, 4 AND 5 AND 59), APPELLANTS IN APPEAL SUIT No. 188 OF 1902 AND RESPONDENTS IN APPEAL SUIT No. 19 OF 1903

v.

SRI RANGACHARIAR AND OTHERS (PLAINTIFFS), RESPONDENTS IN APPEAL SUIT No. 188 OF 1902 AND APPELLANTS IN APPEAL SUIT No. 19 OF 1903.*

Right of suit.—Religious endowment suit concerning—Person interested as worshipper can be added as party.

Persons interested as worshippers in a public religious institution may be added as parties to a suit instituted by a trustee on behalf of the institution against third parties, if such joinder is considered by the Court as desirable in the interests of the trust.

Narayanasami Gurukhal v. Irulappa, (12 M.L.J., 355), followed.

(1) I.L.R., 17 All., 531.

(2) I.L.R., 26 Bom., 109 at p. 115.

(3) L.R., 16 Ch.D., 41.

* Appeals Nos. 188 of 1902 and 19 of 1903, presented against the decree of R. D. Broadfoot, Esq., District Judge of South Arcot, in Original Suit No. 10 of 1899.

THIS was a suit between the trustees of the Vishnu shrine and the trustees of the Siva shrine at Chithambaram, which are both situated within a general enclosure, regarding the right to a mantapam and open space situate therein.

The seventh plaintiff and defendants Nos. 12 to 17 and the fortieth defendant were impleaded as parties as the trustees of the Vishnu temple added them to their own number as co-trustees. They were worshippers. One of the objections raised was that they were improperly made parties. The District Judge found on the evidence that the disputed portions belonged to the Vishnu shrine and passed a decree in favour of the plaintiffs, the trustees of the Vishnu shrine, granting, substantially, all the reliefs claimed, and damages.

Both parties preferred these appeals.

V. Krishnaswami Ayyar and S. Srinivasa Ayyar for appellants in Appeal Suit No. 188 of 1902 and for respondents in Appeal Suit No. 19 of 1903.

T. Rangachariyar, S. Srinivasa Ayyangar and T. Narasimha Ayyangar for respondents in Appeal Suit No. 188 of 1902 and for appellants in Appeal Suit No. 19 of 1903.

JUDGMENT.—These appeals arise out of a suit instituted in the District Court of South Arcot in consequence of disputes between the trustees of the Siva temple of Chidambaram, and the trustees of the Vishnu temple there. The two shrines are situated in the same general enclosure, but the Siva temple is the larger and more important institution. The Vishnu shrine is situated in close proximity to the Siva shrine.

There is no satisfactory evidence as to the respective periods of time when the shrines were established. There is some evidence that the style of architecture indicates that the Sivite shrine is the older. Nevertheless there is no certainty that both may not have been part and parcel of the original design of the founders, inasmuch as there is evidence that Siva and Vishnu shrines exist side by side in many other temples.* In these circumstances the

* BY SUBRAHMANIA AYYAR, J.—As to the existence of Govindaraja's shrine in the Chidambaram temple even prior to the 11th century, the removal of the idol from the shrine by the Chola Sovereign Kulothunga II. and the consequent foundation of the Govindaraja shrine at Tirupati under the auspices of Ramanuja, the Vishnavite Guru, see the paper on 'Ramanuja, Apostle and Reformer' by Mr. S. Krishnaswami Aiyangar, M.A., citing the well-known Tiruchitrambala Kovai of Manickavasagar and Kulothunga Cholan Ula of Ottakoothan I., Wednesday Review, Trichinopoly, 20th June 1905.

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questions in dispute have to be decided upon usage and general probabilities, rather than upon the supposition that any presumption of original right exists in favour of either institution. The main dispute in the appeal (No. 188) by the Sivites is with reference to a mantapam (marked C in the plan exhibit W) to the east of the enclosure containing the Vishnu idol; and also with regard to the "Alwar Sannadhi" marked C₂ in the plan.

The bulk of the oral evidence in the case has been directed to the latter. The District Judge has upheld the claim of the trustees of the Vishnu temple to both these places and in our opinion his decision is right. The general lie of the mantapam with its double row of pillars leading direct from the Vishnu shrine to the Vishnu flagstaff is strongly in favour of the view that the mantapam is part of the building of the temple.

The elevated position of the floor compared with the surrounding open spaces points to the same conclusion.

There was a dispute about the right to the mantapam and the Alwar sannadi so far back as 1849. A careful local enquiry was held by the European Head Assistant Magistrate and a number of witnesses were examined, and his conclusion was decidedly in favour of the Vishnu trustees. He then found that the mantapam and sannadi were in their possession, and he left the trustees of the Siva temple to establish their alleged right by suit, a course which they never thought proper to adopt, though they brought suits against some of the local officers for damages, on the ground that their action was partial and illegal, a claim which they failed to establish. This circumstance, in our opinion, lends great strength to the evidence now adduced by the Vishnavites to show that their possession was undisturbed until the year 1895, when they say that the three Vishnu idols in the Alwar sannadi were illegally and secretly removed by the Sivites on the night of the 7th December. We are unable to accept the testimony on behalf of the defendants that the idols there have always been Sivite. This plea is directly opposed to the finding of the Magistrate in 1849, a finding which would certainly have been directly challenged by a suit against the Vishnavite trustees themselves if it was incorrect. There is no question but that since the 7th December 1895 the idols in the sannadi have been Sivite, and we cannot doubt that there was a substitution of Sivite for Vishnavite idols on that night as alleged by the Vishnavites, a matter which might easily have been accomplished, as the Sivites admittedly had

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possession of the keys of all the premises, and were much the stronger party. Even in this view it was contended for the Sivites that the District Judge should not have restricted the use of the mantapam by the Sivite party to the extent laid down in para. 23 of his judgment. It was argued that Chandrasekhara and four other idols were equally entitled to be taken through, or to be exposed to view at stated times in the mantapam. The evidence to which our attention was drawn in detail does not satisfy us that the use of the mantapam by these idols is not of quite recent origin as found by the District Judge.

As regards the question of damages we are unable to accept the contention that the suit is barred by limitation. Damages are claimed on account of the unlawful pulling down of parts of the mantapam in May and June 1896. The suit was brought in March 1899. We agree with the District Judge that the suit is one for compensation for trespass on immoveable property within the meaning of article 39 of schedule 2 of the Limitation Act.

As to the amount of damages awarded by the District Judge it is not much more than what the thirty-fifth witness for defendants admitted would be required to restore the buildings, and we regard it as reasonable compensation for the injury done.

Passing now to the appeal (No. 19) by the Vishnavites, the only point of any importance urged before us is with regard to the open courtyard, marked L₁ in the plan which the Vishnavites claim as part of the premises of their shrine. The description of the boundaries in the decree of 1875 is not altogether free from ambiguity, and it does not, in our opinion, warrant the conclusion that it is part of the premises. It appears rather to be part of the adjacent open space which does not belong to the Vishnu temple. The rights of the Vishnavites to use this courtyard for certain purposes has been upheld by the District Judge.

As regards the contention that the idol of Manikavasagar should not be allowed to pass under the Kodavarai, but should be required to go through the opening marked AA on the plan, we are unable to say that the decision of the District Judge is erroneous. We also agree with the District Judge in regard to the room marked DD₁ in the plan.

In the result we accept the findings of the District Judge.

It remains to notice the objection taken to the joinder of the seventh plaintiff and of defendants Nos. 12 to 17 and 40. The

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In the result we accept the findings of the District Judge.

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footing on which these were impleaded was as trustees by virtue of the agreement (exhibit B). Assuming the recitals in this document to be true, still, the existing trustees of the Vishnu temple had no power to add to their number as they purported to do. We, however, do not think it necessary to strike out the names of these persons from the list of parties to the suit. The District Judge has found that these persons are interested in the institution as worshippers. There is evidence to the effect that they have contributed materially towards the expenses which had to be incurred in connection with litigation necessitated by the trespasses committed by the Sivites. The Kamudi case (*Narayanasami Gurukkal v. Irulappa*(1)) is a direct authority that persons interested as worshippers in a public religious institution such as the present Vishnu temple, may be added as parties to a suit instituted by a trustee on behalf of the institution against third parties acting to the injury of the institution, if, in the opinion of the Court, such joinder is called for in the interests of the trust. In the case of *Jeyangarulavaru v. Sri Hati Durma Dossji*(2) is also an authority to the same effect, and the fact that in that case the defendant was himself a trustee does not affect the principle. Though upholding the joinder of these persons on the footing that they are interested as worshippers, we direct that the decree be modified by substituting the plaintiffs other than the seventh plaintiff for plaintiffs in that part of the decree which orders possession of C₂ to be given to them, and which awards them damages. In other respects both the appeals are dismissed with costs.

(1) 12 M.L.J., 355.

(2) 4 M.H.C.R., 2.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Sankaran Nair.

YARLAGADDA VEERA RAGAVAYYA AND OTHERS (PLAINTIFFS),
APPELLANTS,

1905.
April 17.

v.

GORANTLA RAMAYYA (DEFENDANT), RESPONDENT.*

Promissory Note.—Promissory note on account of pre-existing loan—Action maintainable on original consideration, even if note unstamped and inadmissible.

Where a bill or note is not itself the original contract but is executed on account of a pre-existing independent obligation complete in itself, an action on the original obligation is maintainable without regard to such bill or note if it is not paid at maturity, provided the party taking the bill or note has done nothing with it which would render the debtor liable on it to third parties; and the inadmissibility in evidence from any cause of such bill or note will not affect the maintainability of the suit.

It will be otherwise if the original cause of action is the bill or note itself.

Sheikh Akbar v. Sheikh Khan, (I.L.R., 7 Calc., 256), followed.

Pothi Reddi v. Velayudasivan, (I.L.R., 10 Mad., 94), distinguished.

Suit by the plaintiffs to recover with interest money lent to the defendant. The plaintiffs alleged that the defendant came to them on a certain morning and borrowed Rs. 400, promising to execute a promissory note for the amount in the evening; that he came in the evening and executed an unstamped promissory note, representing that no stamp was available. The plaintiffs sued for the recovery with interest of this amount and the amount due on another promissory note executed by the defendant. The defendant denied the plaintiffs' claim.

The District Munsif passed a decree for the first loan of Rs. 400 with interest and disallowed the second item of the plaintiffs' claim.

On appeal by the defendant, the District Judge held that the case was on all fours with *Pothi Reddi v. Velayudasivan*(1) and dismissed the plaintiffs' suit.

* Second Appeal No. 445 of 1903, presented against the decree of J. H. Robertson, Esq., District Judge of Kistna, in Appeal Suit No. 553 of 1902, presented against the decree of M.R.Ry. V. Cooposwami Ayyar, District Munsif of Bapatla, in Original Suit No. 112 of 1901.

(1) I.L.R., 10 Mad., 94.

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Plaintiffs preferred this second appeal.

K. Jagannadha Ayyar for V. Krishnaswami Ayyar and
K. Balamukunda Ayyar for appellants.
V. Visvanadha Sastri for respondent.

JUDGMENT.—The District Judge has not fully appreciated the law or the facts in this case.

The plaintiff sued on the original contract entered into between the plaintiff and the defendant alleging that the promissory note (which was not admissible in evidence for want of a stamp) did not constitute the contract between the parties.

The law is clearly laid down by Garth, C.J., in *Sheikh Akbar v. Sheikh Khan*(1) with which we entirely agree. He says at page 259 :—"When a cause of action for money is once complete in itself, whether for goods sold, or for money lent, or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may, always as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note, under such circumstances as to make the debtor liable upon it to some third person. In such cases the bill or note is said to be taken by the creditor on account of the debt, and if it is not paid at maturity, the creditor may disregard the bill or note and sue for the original consideration . . . but when the original cause of action is the bill or note itself and does not exist independently of it . . . here there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other." In *Pothi Reddi v. Velayudasivan*(2), the plaintiff sought to prove the promise contained in the promissory note, viz., to pay at a subsequent named date, because if he had sued on the original consideration his suit would have been barred by the Statute of Limitation. He was therefore bound to rely upon the contract contained in the note and could sue on no other.

In this case the plaintiff's case is that there was a completed contract between himself and the defendant independent of the promissory note and that the unstamped note was not itself the contract but was merely received by him on account of the loan

(1) I.L.R., 7 Cal., 256.

(2) I.L.R., 10 Mad., 94.

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made previously by the plaintiff to the defendant. This the District Munsif has found to be the fact but the District Judge has reversed the decree of the District Munsif without considering the facts on the ground that the case is on all fours with *Pothi Reddi v. Velayudasivan*(1).

No facts are found which in our opinion make the case identical with *Pothi Reddi v. Velayudasivan*(1). We therefore set aside the decree of the District Judge and remand the appeal to the lower Appellate Court for disposal according to law.

Costs will abide and follow the event.

APPELLATE CIVIL.

Before Sir S. Subrahmaniam Ayyar, Officiating Chief Justice,
and Mr. Justice Boddam.

MANJAPPA ROI (FIFTH DEFENDANT), APPELLANT,

v.

KRISHNAYYA (PLAINTIFF), RESPONDENT.*

1905.
July 24.

Transfer of Property Act IV of 1882, s. 43—Mortgagor acquiring the mortgaged property cannot use the mortgage right as a shield against subsequent mortgages executed by himself.

The doctrine that a person paying off a mortgage or purchasing the mortgage property in execution of a decree on the mortgage can set up such mortgage as a shield against puisne incumbrancers will not, on the principle embodied in section 43 of the Transfer of Property Act, apply when the person so paying or purchasing is the mortgagor himself. The effect of the payment or purchase in such cases so far as the mortgagor and those claiming under him are concerned will be simply to extinguish the mortgage, and the rights of subsequent incumbrancers will be determined as if such prior mortgage never existed.

Suit by the plaintiff to recover the amount due on a mortgage bond executed by the first defendant in 1882 and assigned to him by the mortgagee in 1893. Defendants Nos. 1 to 4 were undivided brothers and the first defendant was the manager. The

(1) I.L.R., 10 Mad., 94.

* Second Appeal No. 508 of 1903, presented against the decree of L. G. Moore, Esq., District Judge of South Canara, in Appeal Suit No. 803 of 1901, presented against the decree of M.R.Ry. T. V. Anantan Nair, District Munsif of Mangalore, in Original Suit No. 252 of 1900.

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fifth defendant was in possession under a mortgage executed by defendants Nos. 1 to 4 in 1891.

The properties forming the subject-matter of the suit were mortgaged in 1877 by the first defendant to one Appayya. On that mortgage a suit was instituted and a decree for sale passed in 1879. The property was sold in 1889 and was purchased by one Ganapa and was ultimately purchased by defendants Nos. 1 to 4 in 1891.

The fifth defendant contended that he was the assignee of a purchaser on the footing of a mortgage prior to that of the plaintiff. The sixth defendant held a mortgage on the same properties dated 1884.

The District Munsif passed a decree in favour of the plaintiff directing a sale of the mortgaged properties subject to the prior mortgage of 1877 and the rights under such mortgage. The fifth defendant appealed to the District Court on the ground that the Munsif having decided that the mortgage of 1877 and all rights created under it were valid, ought not to have directed a sale of the property.

The District Judge dismissed the appeal. The fifth defendant preferred this second appeal.

K. Narayana Rau for appellant.

K. P. Madhava Rau and *A. Srinivasa Poi* for respondent.

JUDGMENT.—We are unable to agree with the lower Courts that the fifth defendant had no *locus standi* if, as contended by him, he has any rights as assignee of the mortgage interests purported to be created by exhibits IV and V. No doubt the mortgages relied on by the plaintiff and the fifth defendant were executed after a decree had been obtained against the mortgagor under a previous mortgage of 1877. No doubt also that a sale took place under that decree and the mortgaged property was purchased by the mortgagee at such sale, but the right acquired by such purchase has eventually devolved upon the mortgagor. On the principle embodied in section 43 of the Transfer of Property Act the mortgagor cannot use this subsequently-acquired interest to invalidate his own mortgages to the plaintiff or the mortgages under exhibits IV and V if they really created mortgage rights, and the fifth defendant as claiming through the mortgagor would be equally precluded from raising any question as to the validity of the plaintiff's mortgage. As the result of what has happened the sale of the mortgaged property should be on the footing that the

mortgage of 1877 is now existent if the fifth defendant establishes any rights under exhibits IV and V. MANJAPPA ROI v. KRISHNAYYA.

The decree therefore in directing that the sale should be subject to the mortgage which, as stated above, had already ceased to exist is wrong. The decree is therefore set aside and the suit remanded to the Court of First Instance for fresh disposal after due enquiry into the alleged rights of the several claimants, viz., the plaintiff and the fifth and sixth defendants.

Costs in this and in the lower Appellate Court will be provided for in the revised decree.

APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.*

KRISHNA AYYANGAR AND OTHERS (PLAINTIFF AND
His LEGAL REPRESENTATIVES), APPELLANTS,

1905.
August
18, 29.

VENKATARAMA AYYANGAR AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Succession—Bandhus—Father's sister's daughter's son entitled in preference to paternal grandfather's sister's son.

It is a cardinal principle of Hindu Law that the nearer line excludes the more remote and the ground of distinction in favour of a party who is able to trace his descent with less intervention of females will not apply where he competes with one of a nearer line. The father's sister's daughter's son, being an *atmabandhu*, is entitled to succeed in preference to the paternal grandfather's sister's son—a *pitirbandhu*.

Balasami Panthar v. Narayana Rau, (I.L.R., 20 Mad., 342), referred to.

SuR by the plaintiff to recover properties as the nearest reversioner of the last male holder.

The facts necessary for this report are set out in the judgment.

A. S. Balasubrahmania Ayyar for second to sixth appellants.

R. Sivarama Ayyar or respondents.

* Second Appeal No. 745 of 1903, presented against the decree of M.R.By. S. Dorasami Ayyangar, Subordinate Judge of Tinnevely, in Appeal Suit No. 208 of 1902, presented against the decree of M.R.By. M. E. Narayanasami Ayyar, District Munsif of Ambasamudram, in Original Suit No. 601 of 1901.

KRISHNA
 AYYANGAR
 v.
 VENKATA-
 RAMA
 AYYANGAR.

JUDGMENT.—The dispute in the present case is between two parties who are both bandhus under the Mitakshara Law. The plaintiff is the deceased owner's paternal grandfather's sister's son. The defendant is his father's sister's daughter's son. The lower Courts have held that the defendant is the heir and they are clearly right. Undoubtedly he is an *atmabandhu*, and, as such, nearer to the last owner than the plaintiff who is the owner's *pitirbandhu*. It was, however, urged that the defendant has to trace his relation to the common ancestor through two females while there is the intervention of but one female between the plaintiff and the ancestor common to him and the deceased, and that this circumstance gives the plaintiff a preferential right. Whether having regard to the preponderating influence in the Hindu system of law of relationship through males with reference to the devolution of the heritage of a man such a circumstance as that relied on may or may not avail when the competition is between bandhus of the same category and of the same degree, it is unnecessary to consider. But assuming that the circumstance would in such a case afford a ground for distinction in favour of a party who is able to trace his descent with a less intervention of females, it could not affect the operation of such a cardinal principle of the Hindu Law as that the nearer line excludes the more remote (*Balusami Pandithar v. Narayana Rau*(1)). The defendant is of the nearer line and therefore, as already stated, the person entitled to inherit.

The appeal is dismissed with costs.

(1) I.L.R., 20 Mad., 342.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
 and Mr. Justice Sankaran Nair.

SHIVA RAO (SECOND CLAIMANT), APPELLANT,

v.

NAGAPPA AND OTHERS (FIRST AND THIRD CLAIMANTS),
 RESPONDENTS.*

*Land Acquisition Act of 1894, s. 54—Appeal against award—Hindu Law—
 Charity properties primâ facie inalienable.*

Properties set apart for charities are *primâ facie* inalienable; and where such properties are acquired under the Land Acquisition Act, the award made thereunder may direct the investment of the compensation money in Government securities.

An appeal lies against the award in so far as it directs investment under section 54 of the Land Acquisition Act.

THE facts necessary for this report are set out in the judgment.

Mr. T. Richmond for appellant.

Mr. J. L. Rosario for first respondent.

JUDGMENT.—We are clearly of opinion that an appeal lies against the award in so far as it directs the money to be invested in the purchase of Government promissory notes, it being the appellant's case that, no order for investment should have been made, the land being alienable. The language of section 54 of the Land Acquisition Act (I of 1894) is wide enough to admit of an appeal in such a case as this.

Though the precise nature of the family charity is not stated, yet it is the case of both the parties that the land taken up by Government was the endowment of the family charity. It is not the appellant's case that the charitable trust has been put an end to and so long as the trust lasts, the land is *primâ facie* not alienable. The order for investment was therefore rightly made. If the appellant wishes to have the investment changed and landed property acquired with the money deposited, that can of course be done on proper application.

The appeal is dismissed with costs.

* Appeal No. 100 of 1904, presented against the award of H. O. D. Harding, Esq., District Judge of South Canara, in Original Petition No. 312 of 1903.

1905.
 August 21.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.

1905.
August 18,
21, 29.

MANIAN PATTTER AND OTHERS (RESPONDENTS), APPELLANTS,

v.

THE MADRAS RAILWAY COMPANY BY ITS AGENT AND
MANAGER (PETITIONER), RESPONDENT.*

*Contract Act IX of 1872, s. 74—Not applicable to forfeiture of deposits—
Forfeiture, no relief against, if amount reasonable.*

Neither section 74 of the Indian Contract Act, nor the principles of law laid down in decisions dealing with *promises to pay specified sums* in case of breach of contract apply to cases of forfeiture of deposits for breach of stipulations even when some of them are but trifling while others are not such.

Wallis v. Smith (L.R., 21 Ch.D., 243 at p. 258).

In such cases the rule is that where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with, if reasonable, in amount.

Srinivasa v. Rathnasabapathi, (I.L.R., 16 Mad., 474), not followed.

THE facts necessary for this report are set out in the judgment.

T. R. Ramachandra Ayyar for appellant.

Mr. A. Read for respondent.

JUDGMENT.—One Syed Ismal entered into a contract with the respondent, the Madras Railway Company, to supply for a term of 12 months 2,400 tons of fuel at 200 tons per month at Rs. 4 per ton. It was also agreed between the parties that even after the expiry of the year all the terms of the contract were to hold good for an indefinite further period of time and quantity of fuel, subject to three months' notice from either side of an intention to withdraw from the engagement. The written contract contained various stipulations as to the proper performance of the contract and provided that the contract should be liable to be considered at an end and the sum of Rs. 350 deposited with the Company for the due fulfilment of the contract should be liable to be forfeited for the benefit of the Company, if the contractor failed to make

* Appeal No. 7 of 1905, presented under section 15 of the Letters Patent against the judgment of Mr. Justice Boddam in Civil Revision Petition No. 221 of 1904, preferred from Small Cause Suit No. 55 of 1904 on the file of the Subordinate Judge's Court of Palghat.

punctual delivery in accordance with the terms of the contract and the specification thereto annexed.

The contractor having failed to supply duly, the Company in June 1901 cancelled the contract and forfeited the sum of Rs. 350 deposited with them. Subsequently in execution of a decree against the contractor his right title and interest, if any, in the said deposit amount was sold and was purchased by the appellant. The question is whether he is entitled to recover the amount from the Company as held by the Subordinate Judge, or not, as held by the learned Judge in revision.

Neither section 74 of the Indian Contract Act nor the expositions of law in decisions English or Indian which were referred to in the argument, as to *promises to pay specified sums* in case of breach of contract are really in point, for the rule as to penalties dealt with in them has been uniformly held not to be applicable to cases of forfeiture of deposits for the breach of stipulations even where some of them are but trifling while others are not such (*Wallis v. Smith*(1)). In these cases the bargain of the parties is carried out except when the forfeiture is relieved against on terms which the Court imposes to meet the justice of the case where the circumstances warrant the grant of such equitable relief. In other words the rule governing the class of cases under consideration is that, where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with, if *reasonable*, in amount (*Sedgwick on 'Damages'*, VII edition, vol. I, section 414, p. 593). It was apparently with reference to this principle of reasonableness that Kelly, C. B., and Hawkins, J., in *Cooper v. London Brighton and South Coast Railway Company*(2) upheld the forfeiture of a deposit by a season ticket-holder for his failure to deliver up the ticket on the very day next after its expiry. Unless therefore the forfeiture of the deposit in the present case be found to be unreasonable it must be treated as valid. With reference to this aspect of the question no argument founded on the facts of the case were put forward on behalf of the appellant and having regard to all the circumstances of the transaction there is no ground whatsoever for saying that it is otherwise than perfectly reasonable. As to *Srinivasa v. Rathnasabapathi*(3) the attention of the learned

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(1) L.R., 21 Ch.D., 243 at p. 258.

(2) L.R., 4 Ex. D., 88.

(3) I.L.R., 16 Mad., 474.

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Judges who decided the case was not drawn to the inapplicability of the presumptions and doctrines as to penalties therein relied on to cases of forfeiture of deposits, and their decision if it proceeds solely on those doctrines cannot, as inconsistent with the well established view of the law on the point, be followed.

The appeal is dismissed with costs.

Messrs. Orr, David & Brightwell—Attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

MANICKAM PILLAI (PLAINTIFF), APPELLANT,

v.

RAMALINGA PILLAI AND OTHERS (DEFENDANTS NOS. 2 AND 3),
RESPONDENTS.*

*Hindu Law—Reversionary right, nature of—Transfer of Property Act
IV of 1882, s. 6.*

The right of a presumptive reversionary heir under Hindu Law is no more than a *spes successionis* or expectancy of succeeding to the property. Such expectancy cannot be transferred under section 6 of the Transfer of Property Act.

SUIT to recover lands. The lands were purchased by the plaintiff, from the nearest presumptive reversioner, whilst they were in the possession of the widow of the last male owner. The first issue was, whether the plaintiff acquired any right under the sale.

Both the lower Courts dismissed the plaintiff's suit.

Plaintiff preferred this second appeal.

R. Kuppuswami Ayyar for appellant.

K. S. Ramaswami Sastri for respondents.

JUDGMENT.—The reversioner had nothing to sell. The right of a presumptive reversionary heir under the Hindu Law is no more than a *spes successionis* or expectancy of succeeding to the property. This has been clearly ruled by the Privy Council in *Bahadur Singh*

* Second Appeal No. 404 of 1903, presented against the decree of M.R.By. P. S. Gurumurti, Subordinate Judge of Kumbakonam, in Appeal Suit No. 280 of 1902, presented against the decree of Syed Tajuddin Sahib, District Munsif of Negapatam, in Original Suit No. 413 of 1900.

v. *Mohar Singh*(1). Such an expectancy cannot be transferred under section 6 of the Transfer of Property Act (*Narasimham v. Madavarayulu*(2)).

We dismiss the second appeal with costs.

MANICKAM
PILLAI
v.
RAMALINGA
PILLAI.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.

RAJAMMA (PETITIONER), APPELLANT,

v.

RAMAKRISHNAYYA AND ANOTHER (RESPONDENT),
RESPONDENT.*

1905.
August 16.

*Hindu Law—Acquisitions out of salary, primâ facie separate property—Succession
Certificate Act VII of 1889, s. 19—Discretion of Court in granting certificate.*

Money connected with insurance, the premia for which are paid out of the salary of a deceased Hindu, is *primâ facie* his separate property.

Mahadeva Pandia v. Ruma Narayana Pandia, (13 M.L.J., 75), followed.

Where an application for a succession certificate under Act VII of 1889 by the widow of the deceased in respect of such money is opposed by his brother on the sole ground that the deceased was educated at the family expense, the certificate ought to issue in favour of the widow.

APPLICATION under Act VII of 1889 by the widow of a deceased Hindu for a certificate to enable her to collect the monies due on policies of insurance standing in the name of the deceased, as his heir as well as legatee under his last will and testament.

The brother of the deceased opposed the application on the ground that the policies were joint family property to which he was entitled by survivorship. He prayed for a certificate in favour of himself.

The District Judge granted the certificate to the brother.

The widow preferred this appeal to the High Court.

(1) I.L.R., 24 All., 94.

(2) 13 M.L.J., 323.

* Civil Miscellaneous Appeal Nos. 7 and 8 of 1905, presented against the order of H. O. D. Harding, Esq., District Judge of South Canara, dated the 11th and 15th November 1904, in Original Petitions Nos. 112 and 129 of 1904, respectively.

BAJAMMA
v.
RAMAKRISH-
NAYYA.

B. Sitarama Rau for appellant.

Balakrishna Rau for *K. Narayana Rau* for respondent.

JUDGMENT.—No evidence was taken in the case. It was disposed of upon the petitions of the parties. The decision in *Mahadeva Pandia v. Rama Narayana Pandia*(1) is strongly in favour of the view that the money connected with insurance the premia for which were paid out of the salary of the deceased is *primâ facie* his separate property. In a summary inquiry like the present, the proper course is to follow this view leaving the party, the brother, who sets up that it is joint property to establish it by suit having regard specially to the fact that the brother's claim is based solely upon the assumption that the education of the deceased was at the expense of the family. We set aside the orders of the District Judge and direct that the certificate be issued to the appellant on her giving security to the satisfaction of the District Judge of South Canara. Each party will bear his own costs in these appeals.

APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.*

1905.
July 31.
August 10,
18.

KANNAMBATH IMBICHI NAIR AND ANOTHER (SECOND AND
THIRD COUNTER-PETITIONERS), APPELLANTS,

v.

MANATHANATH RAMAR NAIR AND ANOTHER (PETITIONERS),
RESPONDENTS.*

*Appeal against order of District Court granting sanction—Criminal Procedure
Code, Act V of 1898, s. 195, cls. 6, 7—Power of High Court on such appeal.*

An appeal lies to the High Court against an order of the District Judge granting sanction under clauses 6 and 7 of section 195 of the Code of Criminal Procedure. Where such order has revoked the sanction granted by the Munsif

(1) 13 M.L.J., 75.

* Civil Miscellaneous Appeal No. 115 of 1905, presented against the order of L. G. Moore, Esq., District Judge of South Malabar, in Miscellaneous Petition No. 197 of 1904, presented against the order of M.R.Ry. T. V. Anantan Nair, Principal District Munsif of Calicut, in Miscellaneous Petition No. 764 of 1904 (Small Cause Suit No. 260 of 1903).

for prosecution under certain sections of the Indian Penal Code but granted sanction to prosecute under other sections, it is competent to the High Court on appeal, therefrom, not only to revoke the sanction granted but also to grant the sanction refused.

KANNAMBATH
IMBICHI
NAIR
v.
MANATHA-
NATH RAMAR
NAIR.

THE respondents, as plaintiffs, brought a suit for money against the appellants and others in the Munsif's Court of Calicut. The appellants pleaded a discharge by payment to the fifth defendant in that suit and produced a receipt (exhibit I) purporting to be signed by the fifth defendant in support of their plea. The receipt was found to be a forgery and a decree was passed for the amount claimed by the plaintiffs.

On the application of the plaintiffs (respondents) sanction was granted by the Munsif to prosecute the appellants under sections 464 and 193 of the Indian Penal Code.

On appeal the District Judge revoked the sanction under these sections, but granted, instead, sanction to prosecute under section 192 of the Indian Penal Code.

The appellants first put in a revision petition under section 622 of the Code of Civil Procedure, which was, however, admitted and treated as an appeal under section 195 of the Code of Criminal Procedure.

Mr. W. Barton and *B. Govindan Nambiar* for appellants.

C. V. Anantakrishna Ayyar for respondents.

ORDER (SANKARAN NAIR, J.).—An application was made for sanction to prosecute the petitioners under sections 463, 471 and 493, Indian Penal Code, and the Munsif granted sanction for prosecution as prayed for. There was no application before him for sanction to prosecute the petitioners for an offence under section 192, Indian Penal Code, though he discusses the applicability of that section to the facts before him.

The District Judge in appeal has revoked the sanction granted by the District Munsif, but has granted sanction to prosecute the petitioners for an offence under section 192, Indian Penal Code.

I am of opinion that in this case an appeal lies to this Court against the order of the District Judge under clauses (6) and (7) of section 195 of the Code of Criminal Procedure.

Mr. Barton applies that this petition may be treated as an appeal. I am inclined to allow the request, and as appeals have to be heard by a Bench of two Judges I direct this to be posted accordingly.

KANNAMBATH
IMRICH
NAIR
v.
MANATHA-
NATH BAKAR
NAIR.

The case came on for hearing before a Bench constituted as above. Their Lordships delivered the following

JUDGMENT :—For reasons stated in the order dated the 31st July 1905, Mr. Barton's application to revoke the order of the District Judge was treated as an appeal.

We have now heard Mr. Barton and are unable to agree with his contention that we have only to deal with the objection against the order sanctioning prosecution under section 192, Indian Penal Code. Under the provisions of the Criminal Procedure Code, section 195, the Appellate Court has power to revoke any sanction granted by the Court against whose order the appeal is made, as also to grant sanction refused by it. The District Judge apparently came to the conclusion that the signature to the receipt as well as the thumb marks therein were really affixed by the first defendant and probably this is correct. There can, however, be no doubt that the payment of Rs. 150 and odd recited in the receipt is untrue. The question as to this payment was the crucial one, and as the petitioners stated on affirmation, positively, that they saw the payment made, we think the offence for which sanction for prosecution should be given is that of giving false evidence under section 193, Indian Penal Code. The order of the District Judge will be modified accordingly.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

KANNAN NAMBIAR, PLAINTIFF,

v.

ANANTAN NAMBIAR AND OTHERS, DEFENDANTS.*

Jurisdiction—Subsequent extension of powers will not apply to a suit previously instituted.

A suit rightly instituted as an original suit in a District Munsif's Court must remain for trial as an original suit in such Court and a District Court, by a

* Referred Case No. 14 of 1904 stated under section 646-B of Act XIV of 1882 by M.R.Ry. A. Venkataramana Pai, District Judge of North Malabar, in Small Cause Suit No. 92 of 1904 (vide Referred Case Nos. 15 to 20 of 1904).

subsequent extension of its powers as a Court of Small Causes, cannot acquire jurisdiction to try such a suit.

Hari Kamayya v. Hari Venkayya, (I.L.B., 26 Mad., 212), followed.

THE facts necessary for this report are set out in the letter of reference, which runs as follows :—

"I have the honour, under section 646-B of the Civil Procedure Code, to submit the records in the seven cases shown in the list appended, and to state my reasons for considering that the order of the District Munsif of Tellicherry, returning the complaints as not cognizable by him is not correct.

These suits were originally filed in the District Munsif's Court, Badagara, as *ordinary* suits on the dates shown against their number. In the recent re-distribution of work among the Munsifs in this district, the amsams in which the cause of action arose in these cases were transferred to the District Munsif of Tellicherry with effect from 30th May last, and consequently the cases were transferred to the file of the latter Court.

By the notification of Government published at page 834 of the *Fort St. George Gazette*, Part I, dated 26th August 1902, the Small Cause jurisdiction of the District Court is limited to the Tellicherry Munsif, and consequently when the aforesaid amsams were added to the Tellicherry Munsif, the District Court acquired Small Cause jurisdiction over this area. The District Munsif of Tellicherry has returned the complaints to be presented to the proper Court, he being of opinion that the claims being of the nature of Small Causes and for sums below Rs. 500 under the jurisdiction of the Small Cause Side of the District Court, no other Court within such jurisdiction could try them. But he appears to have overlooked the ruling in *Hari Kamayya v. Hari Venkayya*(1) that when a suit is properly filed in a Court of *ordinary* jurisdiction, *i.e.*, subject to appeal, it cannot be dealt with by a Court of Small Causes of *final* jurisdiction subsequently established. The suits under reference were properly instituted before the Badagara Court as *ordinary* suits, and are now triable by the Court of the District Munsif of Tellicherry to which has been transferred the business of the former Court which ceased to be the Court for the local area in question, and have to be dealt with in the same way as if they had been originally instituted in the

(1) I.L.B., 26 Mad., 212.

KANNAN
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NAMBIAH.

Tellicherry Court when it was competent to entertain them, notwithstanding that the District Court subsequently acquired Small Cause jurisdiction over the said area on its transfer from the Badagara to the Tellicherry Munsif."

The parties were not represented.

JUDGMENT.—When the suits were instituted in the Badagara Court, they were rightly instituted there as original suits and under the ruling at *Hari Kamayya v. Hari Venkayya*(1) referred to by the District Judge they remained for trial as original suits. The District Munsif of Tellicherry will therefore place them on his file and dispose of them as such.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmaniam Ayyar, Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Moore.

1905.
November
5, 21.

EMPEROR

v.

CHINNA KALIAPPA GOUNDEN AND ANOTHER.*

Criminal Procedure Code—Act V of 1898, s. 203—Dismissal of complaint under, no bar to Magistrate rehearing complaint.

On a reference by the Sessions Judge as to whether it was competent to a Magistrate, after dismissing a complaint under section 203 of the Code of Criminal Procedure, to rehear the complaint, when such order of dismissal had not been set aside by a higher Court:

Held, (SUBRAHMANIAM AYYAR and DAVIES, JJ., dissenting) that the dismissal of a complaint under section 203 of the Code of Criminal Procedure does not operate as a bar to the rehearing of the complaint by the same Magistrate, even when such order of dismissal has not been set aside by a competent authority.

Mahomed Abdul Mennan v. Panduranga Row, (I.L.R., 28 Mad., 256), dissented from.

Dwarkanath Mondul v. Beni Madhab Banerjee, (I.L.R., 28 Cal., 652), approved and followed.

(1) I.L.R., 26 Mad., 212.

* Case Referred No. 89 of 1905 (Criminal Revision Case No. 865 of 1905) for the orders of the High Court under section 438 of the Code of Criminal Procedure by G. F. T. Power, Esq., Sessions Judge of Coimbatore, in his letter, dated 18th September 1905.

Mir Ahwad Hossein v. Mahomed Askari, (I.L.R., 29 Cal., 726), approved and followed.

Per Sir ARNOLD WHITE, C.J.—The power to enquire into an offence must be held to exist in a Magistrate until something has occurred to divest the Magistrate of this jurisdiction. An order under section 203 of the Code of Criminal Procedure is not a judgment to which the provisions of section 369 will apply. The principle of *autrefois acquit* will not apply as there is no trial when the complaint is dismissed under section 203 of the Code of Criminal Procedure.

The provisions of sections 147, 400, 215 and 210 of the Code of Criminal Procedure of 1872 compared with the corresponding sections 203, 403, 253 and 242 of the present Code.

The alterations in the present Code in regard to the sections under consideration were merely drafting alterations and were not intended to effect and did not effect any alteration in the law as laid down by the old Code.

Per BENSON, J.—The decisions in *Queen-Empress v. Adam Khan* (I.L.R., 23 All., 106), *Niratan Sen v. Jogesh Chundra Bhattacharjee* (I.L.R., 23 Cal., 983), and *Mahomed Abdul Mennan v. Panduranga Row* (I.L.R., 28 Mad., 256), do not apply, as in those cases it was not the same but a different Magistrate who proceeded to rehear the complaint.

There is no bar under the Code to the complaint being reheard unless the proceedings have reached such a stage of finality that an acquittal or an order operating as such under the Code is recorded.

Per MOORE, J.—The maxim *nemo bis vexari* has no application to an order under section 203 of the Code of Criminal Procedure, though it may be a good argument, where an accused has been discharged under sections 263 and 259 of the Code.

Per SUBRAHMANIAM AYYAR, J.—Although the technical doctrine of *autrefois acquit* will apply only to acquittals, the principle underlying such doctrine, that a person should not, in respect of an offence, be in jeopardy of prosecution more than once, applies to cases where the prosecution failed to reach the stage of acquittal without any fault on the part of the accused, unless its application is precluded by the provisions of the Code.

Acquittal in common law means an acquittal after verdict or sentence. The Legislature having by sections 333, 494 and 248 of the Code of Criminal Procedure given the term a wider significance, the explanation to section 403 was intended to guard against the term being applied to cases where the plea of *autrefois acquit* was not technically applicable and not to bar the application of the aforesaid analogous principle where justice required it. There being thus no legal provision to the contrary, an order dismissing a complaint or discharging the accused, must, on the above principle, operate as a bar to further enquiry into the same matter as long as such order remains in force. Orders under sections 203, 253 and 259 of the Code of Criminal Procedure stand on the same footing as regards the application of this doctrine.

There is no inherent power in a Magistrate to revise his own order of dismissal or discharge.

THE facts are fully set out in the Sessions Judge's letter of reference, which is as follows.

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GOUNDEN.

On the 21st July 1905, Chinnayya Gounden presented to the Head Assistant Magistrate, Pollachi, a written complaint against (1) Chinna Kaliappa Gounden, (2) Rangaya Gounden and (3) Subbier, of which a translation is as follows:—

"I bought the land of the first accused a year ago, and on the 26th May 1904 executed a promissory note to him for Rs. 160 the unpaid balance owed to him by me. The first accused allowed his cattle to graze on the land which I bought and which was in my possession after the purchase and caused damage to my crop. I therefore complained to the Stationary Sub-Magistrate, and when the case came on for enquiry, a promissory note was produced by me and another was produced by the accused. When the Magistrate examined the attester and the writer of the promissory note which I produced, Maniam Ranga Gounden and Subbier, they said that they did not sign and that the signatures were not genuine.

"The accused came to me on 28th January 1905 with a forged promissory note and fraudulently read out the forged note as though it was the note which I executed, and deceived me, and received from me Rs. 178 being the principal and interest due, and made an entry of payment on the forged note and left it with me. I cannot read well. I learnt that it was forged only after I produced it in the Magistrate's Court and the case was enquired into. I therefore pray that enquiry may be made about the forgery of the promissory note by the accused, about their cheating me by fraudulently reading it and making me believe it, and about their receiving the money from me."

On the same date (21st July) the Magistrate examined the complainant under section 200, Criminal Procedure Code, the substance of the examination being reduced to writing as follows:—
"Last year I bought some land from first accused. Last January the accused created a false promissory note for Rs. 160. They showed the promissory note to me and demanded the money. I paid it. I had executed a promissory note to them for Rs. 160 as balance of the price of the land. I presented a complaint before the Stationary Sub-Magistrate, Pollachi, against first accused under the Cattle Trespass Act, last month. He then stated that I owed him Rs. 160. I told the Sub-Magistrate that I had paid Rs. 160 and recovered the promissory note. Then I showed the Sub-Magistrate the promissory note. My complaint is that the

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accused got Rs. 160 from me. The accused gave me the promissory note in exchange for that. My complaint is that the accused demanded the money in the Sub-Magistrate's Court after I had paid it."

The Magistrate then, on the same date, made the following order: "Complainant states that he executed a promissory note to first accused and paid the amount in January and received back the promissory note and that a month ago in the Stationary Sub-Magistrate's Court the accused stated that he still owed him the money. This is all his complaint. No offence has been committed. The complaint is therefore dismissed under section 203, Criminal Procedure Code."

After this order was made (on the same date) Chinnayya Gounden presented a petition to the Magistrate in which he explained that his complaint was that the accused had forged a document and prayed that the case might be "taken on file and enquired into."

The Magistrate then on the same date, examined him again apparently under section 200 of the Criminal Procedure Code, and three days afterwards 24th July made the following order: "The offence complained of falls under section 467 of the Indian Penal Code besides the minor sections 419 and 468, Indian Penal Code, forwarded to the Stationary Sub-Magistrate, Pollachi, for enquiry and committal to the Court of Session if a *prima facie* case is made out."

The Stationary Sub-Magistrate has now committed Chinna Kaliappa Gounden and Subbier to this Court on the charge that Subbier forged a promissory note and Chinna Kaliappa Gounden abetted the forgery and that they also committed offences punishable under sections 468, 471 and 420 of the Penal Code.

I think that the commitment should be quashed. The order of the Head Assistant Magistrate dismissing the complaint under section 203 was no doubt wrong and was made because the Magistrate did not apprehend rightly what the complainant was, but having been made, it must be considered to be in force until competent authority (that is to say, the High Court, Court of Session or District Magistrate) sets it aside and orders further enquiry. See *Mahomed Abdul Mennun v. Panduranga Row*(1) and *Komal*

(1) I.L.R., 28 Mad., 255.

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Chandra Pal v. Gourchand Audhukari(1). The Head Assistant Magistrate had, I submit, no jurisdiction to revive proceedings, and his order of 24th July referring the case to the Stationary Sub-Magistrate for enquiry was made without jurisdiction and did not give jurisdiction to the Sub-Magistrate.

Public Prosecutor (Mr. E. B. Powell) in support of the reference.

T. R. Ramachandra Ayyar and T. R. Krishnaswami Ayyar for accused.

T. Rangachariar (*amicus curiæ*).

JUDGMENT—Sir ARNOLD WHITE, C.J.—The general question argued before us in this case was whether it was open to a Magistrate to hear a complaint which has been dismissed by an order under section 203 of the Criminal Procedure Code, the order of dismissal not having been set aside by a higher Court.

In support of the view that the Magistrate had no such power, it was urged that a power to rehear or revise, like a right of appeal, was the creature of statute and that, in the absence of express statutory provisions conferring such power, the power did not exist. I am not prepared to accept this proposition. It seems to me that the question whether there is a power to rehear must be determined with reference to the enactments which create and regulate the jurisdiction of the Magistrate. The Code confers upon a Magistrate jurisdiction to enquire into an alleged offence. *Prima facie*, therefore, such jurisdiction exists in the case of an alleged offence. It must be held to exist unless it appears that something has been done, or some event has occurred, which has the legal effect of depriving the Magistrate of this jurisdiction.

The question therefore is whether the fact of the dismissal of the complaint by an order made under section 203, operates, so as to deprive the Magistrate of jurisdiction to enquire into the offence alleged in the complaint. The first matter to be considered is—there any provision of the Code which lays this down in express terms? There is no such provision. I do not think that, in substance, with reference to the question of jurisdiction, any distinction can be drawn between entertaining a fresh complaint and rehearing the original complaint. The argument that the Magistrate, having made the order of dismissal, is *functus officio*

(1) I.L.R., 24 Cal., 286.

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applies equally to both cases, and the formality of putting in a fresh complaint cannot be said to create a jurisdiction, which, without such formality, a Magistrate would not have possessed.

It was argued that an order under section 203 was a "judgment" to which section 369 applied. Section 369 provides "No Court other than a High Court, when it has signed its judgment, shall alter or review the same except as provided in sections 395 and 484 or to correct a clerical error." The Code does not define "judgment" but section 366 lays down what the language and the contents of a judgment are to be. By section 367, the judgment is to contain the decision and the reasons for the decision. Section 203 enacts that when a Magistrate dismisses a complaint by an order under that section, he shall briefly record his reasons for so doing. If an order under section 203 is a judgment within the meaning of section 369, this provision in section 203 is unnecessary and redundant; or, to put it another way,—the way in which it is put by Prinsep, J., in *Dwarka Nath Mondul v. Beni Madhab Banerjee*(1) in the case of an order of discharge as in the case of an order dismissing a complaint, it is expressly required by the law that a Magistrate should state his reasons, and it may be taken that if it had not been so required, it would have been unnecessary for the Magistrate to state any reasons for his order. Consequently in this point of view, the order does not constitute a judgment.

In my opinion an order of dismissal under section 203 is not a judgment within the meaning of section 369. It is to be observed that in *Dwarka Nath Mondul v. Beni Madhab Banerjee*(1), Ghose, J., who dissented from the six other Judges on the actual question for determination, was of opinion that the order made in that case, which purported to have been made under section 259 was not a judgment. The Judge observes that an order of discharge made after an investigation of the merits is a judgment, but he points out that there is, in this respect, a distinction between a summons and a warrant case, and he is careful to limit his observation to a warrant case.

It was further argued, in support of the view that the Magistrate had no jurisdiction to rehear, that even if the order made under section 203, were not a judgment within the meaning of section 369, the general principle was applicable and the order was

(1) I.L.R., 28 Cal., 652 at p. 680.

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final unless and until set aside by a superior tribunal. What general principle? I know of no general principle which can be said to be applicable. It cannot be the principle on which the right to plead *autrefois acquit* is based, because section 403 says that for the purpose of the exercise of this right the order is not an acquittal. The argument *ab inconvenienti* is of little weight. A Magistrate who allowed the rehearing of complaints which he had purported to dispose of, to develop into a habit would, no doubt, attract the attention of the higher authorities. The question of jurisdiction, as I have already said, is to be determined by an examination of the provisions of the Code which confer and regulate the jurisdiction. There is no express provision of the Code which in express terms either gives or takes away the jurisdiction to enquire into an alleged offence with regard to which a complaint has been brought and has been dismissed. But in my opinion the Code implicitly, though not directly, gives the jurisdiction. The explanation to section 403 enacts that the dismissal of a complaint is not an acquittal for the purposes of that section. The purpose of the section is to protect the person who has been acquitted from liability to be tried for the same offence. The explanation says that in the case of a dismissal he is not so protected. No doubt the section only applies to the case of a person who has been tried, and in the case of dismissal there has been no trial. Strictly speaking neither the section nor the explanations apply to a dismissal; but it seems to me clear, that what the Legislature meant to lay down was that a dismissal is not a bar to further proceedings in respect of the alleged offence, and that the right to take further proceedings is not dependent upon the exercise by the higher Courts of the powers of revision conferred by the Code. If there is no bar to further proceedings, there is jurisdiction to entertain these further proceedings, and if there is this jurisdiction there is nothing in the Code which deprives a Magistrate of jurisdiction by reason of the fact that he has made an order dismissing the complaint. That this is the true construction of the explanation to section 403 seems to me clear when we read the explanation by the light of the corresponding enactments contained in the Code of 1872 to which Mr. Rangachari, in his able argument, called our attention. Section 147 of the Code of 1872, which corresponds to section 203 of the present Code, contains the provision. "The dismissal of a

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complaint shall not prevent subsequent proceedings." This provision does not occur in section 203 of the Code, but in section 403 we have the explanation that a dismissal is not an acquittal for the purposes of that section. There is nothing in the explanation in section 460 of the Code of 1872, which corresponds to section 403 of the present Code. Again, section 215 of the Code of 1872 which corresponds to section 253 of the present Code contains the explanation "a discharge is not equivalent to an acquittal and does not bar the revival of a prosecution for the same offence." This explanation does not occur in section 253 of the present Code, but in section 403 we have the explanation that the discharge of the accused is not an acquittal for the purposes of that section. There is nothing corresponding to this explanation in section 460 of the Code of 1872. The language of the Code of 1872 in dealing with the effect of a discharge is even stronger than the language of that Code in dealing with the effect of a dismissal. The language in the one case is "does not bar the revival of a prosecution"; in the other "shall not prevent subsequent proceedings." In the case before us we are only concerned with the question of dismissal, but if the legal effect of a discharge, when process has issued to the accused and there has, or may have, been an investigation on the merits, does not operate so as to bar the revival of a prosecution, it follows *a fortiori*, that the legal effect of a dismissal, when no process has issued to the accused, does not operate so as to bar the revival.

Turning once more to the Code of 1872, I find that section 210 which provides for the withdrawal of a complaint contains a provision that a complaint withdrawn under that section shall not again be entertained. The corresponding section of the present Code (section 242) does not contain this express provision, but it provides, in such a case, for the acquittal of the accused. The effect is precisely the same. It seems to me that the alterations effected in the present Code in connection with the matter under consideration were merely drafting alterations and were not intended to effect, and did not effect, any alteration of the law as laid down in the Code of 1872.

I observe that in the course of the argument in *Dwarka Nath Mondul v. Beni Madhab Banerjee*(1) it was contended that as there

(1) I.L.R., 28 Calc., 652 at p. 659.

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was distinct provision in the Code of 1872 that a discharge was not to bar the revival of a prosecution, and no provision in the same terms in the present Code, the Legislature intended to curtail the power of revival, and Mr. Justice Ghose in his dissenting judgment in that case (see p. 667) and also in his dissenting judgment in *Mir Ahwad Hossein v. Mahomed Askari*(1) appears to accede to this argument. The inference which I draw is precisely the opposite to that drawn by the learned Judge. It seems to me that the Legislature did not intend to alter the law as laid down in the Code of 1872 with regard to this question. Assuming, as appears to have been assumed by the learned Judge, that under the Code of 1872, in the case of an order of dismissal or of discharge the Magistrate making the order had jurisdiction to rehear the case, I think the law is the same under the present Code. If the Legislature had intended to alter the substantive law in a matter of jurisdiction they would have done so expressly and directly and not by a side wind. To my mind the alterations in the present Code amount to nothing more than a transposition of sections and, possibly, the adoption of a more scientific terminology. In the cases in which the view has been taken that a Magistrate has no jurisdiction to rehear, the judgments proceed mainly upon the ground that, having regard to the provisions of section 437 which gives power to the higher Courts to make further enquiry into a complaint which has been dismissed, the Legislature cannot have intended that the tribunal which deals with the case in the first instance should have the power to rehear. Now, section 437 is an enabling section enacted for the purpose of giving powers of control and revision to the higher Courts. I cannot see how the conferring of such powers can be said to operate so as to cut down the jurisdiction of the Court which deals with the case in the first instance.

As regards the authorities, so far as the Calcutta High Court is concerned, Prinsep, J., points out in his judgment in *Dwarka Nath Mondul v. Beni Madhab Banerjee*(2) it was frequently held under the Code of 1872 that a Magistrate could rehear a complaint which had been dismissed, though the Calcutta High Court thought proper to restrict the exercise of the power to cases in which fresh evidence was forthcoming. I am bound to say, however, that I feel some doubt as to whether the cases to which the learned Judge

(1) I.L.R., 29 Calo., 726 at p. 733. (2) I.L.R., 28 Calo., 652 at p. 659.

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refers, viz., *Hari Singh v. Danish Mahomed*(1), *Kistoram Mohara v. Anis*(2), *Empress v. Donnelly*(3), and *In the matter of Dijahur Dutt*(4), altogether support his statement as to the course of practice in Calcutta.

In the case of *Niratan Sen v. Jogesh Chundra Bhattacharjee*(5) the judgment proceeded upon the ground that when the Code lays down a procedure for having an order of dismissal set aside it is reasonable to conclude that the Legislature intended that the order of dismissal should be interfered with only in the manner provided (see judgment of Banerjee, J., on p. 988).

For the reasons which I have stated this view does not seem to me to be sound. In *Komal Chandra Pal v. Gour Chand Audhikari* (6), the Court merely followed the decision of the Calcutta High Court of the previous year. In the cases in *Dwarka Nath Mondul v. Beni Madhab Banerjee*(7) and *Mir Ahwad Hossein v. Mahomed Askari*(8) to which reference has been made a different view was taken by Full Benches and I think that this view was right. As regards the Bombay High Court the only reported case upon the point appears to be *Reg. v. Devama*(9). In this case the same view was taken as that adopted in the recent Calcutta decisions. The matter came before the High Court, but the High Court declined to make any order upon the ground that it was open to the Magistrate who had succeeded the Magistrate who made the order of dismissal to rehear the case if he thought fit. The cases of *Queen-Empress v. Bhimappa Bin Ramanna*(10) and *In re Harilal Buch*(11) do not appear to me to be in conflict with this decision.

The same view was also taken by the Allahabad High Court in *Queen-Empress v. Puran*(12) and I do not think this case can be distinguished from the case in *Niratan Sen v. Jogesh Chundra Bhattacharjee*(5) on the grounds suggested by Banerjee, J., in the latter case (see p. 989).

In *Queen-Empress v. Adam Khan*(13) the Allahabad High Court expressly limited their decision to the facts of the case before them. They did not decide that a Magistrate had no jurisdiction to

(1) 20 W.R. Cr., 46.

(3) I.L.R., 2 Calo., 405.

(5) I.L.R., 28 Calo., 983.

(7) I.L.R., 28 Calo., 652 at p. 659.

(9) I.L.R., 1 Bom., 64.

(11) I.L.R., 22 Bom., 949.

(13) I.L.R., 22 All., 107.

(2) 20 W.R. Cr., 47.

(4) I.L.R., 4 Calo., 647.

(6) I.L.R., 24 Calo., 286.

(8) I.L.R., 29 Calo., 726 at p. 733.

(10) I.L.R., 19 Bom., 732.

(12) I.L.R., 9 All., 85.

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rehear or that the earlier Allahabad case was not good law. They held that when a competent tribunal has dismissed a complaint another tribunal of exactly the same powers cannot reopen the same matter.

With all respect to the learned Judges who decided the case of *Mahomed Abdul Mennan v. Panduranga Row*(1) I am unable to agree with that decision or with the ruling referred to in Mr. Weir's 'Criminal Rulings,' pp. 874 and 875.

In *Chinnathambi Mudali v. Satta Gurusawmy Chetty*(2) which came before me as a single Judge, I took the view that the decision of this Court in *Mahomed Abdul Mennan v. Panduranga Row*(1) did not preclude me from holding (following *Dwarka Nath Mondul v. Beni Madhab Banerjee*(3) that a Magistrate had jurisdiction to rehear a case in which he had discharged the accused by an order made under section 259, though I did not decide the case upon that ground since it appeared to me that it was open to the Magistrate to proceed with the case upon the fresh complaint which had been filed in that case. But as I have already stated I do not think that, as regards the question of jurisdiction, the filing of the fresh complaint makes any difference. (I note that I was in error in that case in saying that in *Mahomed Abdul Mennan v. Panduranga Row*(1), *Niratan Sen v. Jogesh Chundra Bhattacharjee*(4), *Komal Chandra Pal v. Gour Chand Audhikari*(5) and *Mir Ahwad Hossein v. Mahomed Askari*(6) the order was made under section 203. It was made under that section in the first three cases. In the last case it was made under section 253.)

The case before us relates only to an order of dismissal under section 203 and for the purposes of the case it is enough to say that in my opinion it is open to a Magistrate to rehear a complaint which he has dismissed by an order of dismissal under section 203, although the order has not been set aside by a higher Court. I may add, however, that, as regards the point which has been under consideration in this case, I do not think that any distinction can be drawn between an order made under section 203 and an order made under section 253 or 259.

The Sessions Judge will be directed to proceed with the trial.

(1) I.L.R., 28 Mad., 255, 256.

(3) I.L.R., 28 Cal., 652.

(5) I.L.R., 24 Cal., 286.

(2) I.L.R., 28 Mad., 310.

(4) I.L.R., 23 Cal., 983.

(6) I.L.R., 29 Cal., 726.

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SUBRAHMANIA AYYAR, J.—The question for our determination on this reference, stated in the abstract, is when a Magistrate, having jurisdiction to entertain a complaint, dismisses the complaint under section 203 of the Criminal Procedure Code, or, where he discharges the accused, whether in such cases it is competent to the Magistrate, either at the instance of the complainant or of his own motion, to set aside the dismissal or the discharge and revive the prosecution.

The view, adopted in the decisions cited in the argument, that the Magistrate is competent to do so, seems to rest on two assumptions. One of the assumptions is that because the plea of a previous acquittal is not available for the accused in cases where the complaint is dismissed or where the accused is discharged, therefore, it is competent to renew the prosecution even though the order dismissing the complaint or the order discharging the accused, has not been set aside. On principle this assumption is clearly unsound. Now, of course, the reason for the plea of *autrefois acquit* is that an accused person should not, in respect of an offence, be in jeopardy of prosecution more than once. Though, technically, such a plea cannot be relied on where there has been no trial resulting in an actual acquittal, it would be impossible to contend that the great principle with reference to which the law allows the said plea should be inapplicable to cases where the prosecution failed before it reached that stage without any fault on the part of the accused. If it is justice that a person, prosecuted on a former occasion upon evidence which appeared sufficiently strong to warrant his being put on trial and being called upon for his defence and his evidence, should not be vexed again in the matter when the trial terminates in his favour, it must, *a fortiori*, be so, when the evidence on which his prosecution was initiated was so weak as to justify the trial being concluded earlier and the accused discharged and saved from the necessity of entering upon the vindication of his innocence. Surely it is also but good sense to hold that, when a Magistrate after examining the complainant and taking the steps authorized by law to satisfy himself as to its being well-founded, dismisses it under section 203, the complainant should not be permitted to renew his complaint so long as the order against him stands undisturbed. Were it otherwise, the complainant in such unfounded cases would have the power to vex his opponent and waste

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public time without limit inasmuch as if it is allowable to a complainant to renew his complaint once it would logically follow he could do so as often as he chooses, the authorities being powerless to prevent such action on his part except by recording a judgment of acquittal so as to enable the accused to plead the acquittal in bar of such frivolous proceedings by the complainant. Nor is authority wanting for the view that even where the plea of *autrefois acquit* is not technically available, the principle of it is available for the accused when the interests of justice require its extension in his favour. Bishop, in his Commentaries on the law of Criminal Procedure, after pointing out that according to the better doctrine a person is in legal jeopardy when the jury is empanelled and ready to try him on a valid indictment and there is no latent or patent obstacle in the judicial path to prevent the cause proceeding to the end, observes "then, if, contrary to his rights and without his consent, the cause is suffered to break off before a verdict of acquittal or conviction is reached, there cannot technically be a plea of *autrefois acquit* or *autrefois convict* by reason of this jeopardy, yet the prisoner is entitled in some way to rely upon it afterwards for his protection." (Edition of 1866, volume 1, section 573.) The same jurist devotes sections 584 to 587 to the consideration of what he calls the defence of former jeopardy, when neither of the pleas *autrefois acquit* or *autrefois convict* is available, and lays down that a plea analogous to the plea of *autrefois acquit* setting out the special facts which show the jeopardy may be brought forward as the proper method of taking the objection and in suggesting a form for this plea, he inserts the clause "and the said A (accused) further saith, that, though no verdict was reached in said case, the failure thereof was not owing to any consent by him the said A made or given, or any interposition of Providence, or any other thing which in law should subject the said A to be again put in jeopardy; and the record of the said former jeopardy still remains, and is in no way reversed or made void."

Such being the necessary deductions from the fundamental principle *nemo bis vexari*, let us see whether there is anything in the provisions of the Criminal Procedure Code which preclude the plea analogous to *autrefois acquit* being set up by a person against whom prosecution is sought to be revived, while the order dismissing the complaint against him or discharging him

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has not been set aside. In determining the precise scope and effect of section 403 (on the explanation to which so much stress was laid by Mr. Rangachariar) the departure made by the framers of the Code in using the term acquittal in a sense different from what is ordinarily attached to it as a term of English law, must be understood. Now it is scarcely necessary to say that the words "conviction" and "acquittal" have meanings of various shades. *Burgess v. Batefeur*(1) is in point. There Tindal, C.J., observes "undoubtedly 'conviction' is *verbum equivocum*: it is used sometimes to denote the verdict of the jury, and at other times in its strict legal sense, to denote the judgment of the Court"—at p. 211. Again at p. 212 he observes "So, the word 'acquittal' is an equivocal expression: in common parlance a party is said to be acquitted by the verdict of the jury finding him not guilty; but it is only the formal judgment of the Court that in legal intendment satisfies the word acquittal." Turning to the meaning of the latter term as given by lexicographers. according to Webster it is "a setting free, or deliverance from the charge of an offence, by verdict of a jury or sentence of a Court." Bouvier in his 'Law Dictionary' expresses the same in similar words "the absolution of a party accused on a trial before a traverse jury." Another explanation of the term by the latter author is "the absolution of a party charged with a crime or misdemeanor." The distinction between the two meanings of course is that the absolution in the former or the narrower sense takes place when the trial has reached its last or final stage while in the latter case the absolution is at some earlier stage, of the trial. Under the common law the plea of *autrefois acquit* was technically available only where there was an acquittal after verdict or sentence. In the case already cited Tindal, C.J., points this out when he observes "a plea of *autrefois acquit* or *autrefois convict* could only be satisfied by the production of a regular record" that is a judgment following a verdict. Our Criminal Procedure Code however has modified the common law rule in regard to certain instances by special provisions. Thus under section 333 of the Code, a *nolle prosequi* by the Advocate-General operates as an acquittal if the Judge so directs. Under section 404 on the withdrawal from prosecution after a charge has been framed

(1) 8 Scott. N.R., 194.

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or when no charge is required, acquittal follows. Similarly in summons cases under section 248 if the complainant withdraws with the permission of the Magistrate. These are clear instances in which the plea of *autrefois acquit* could not have been raised according to the common law for the reason that there could be no judgment or verdict in those cases. Thus acquittal as used in section 403 comprises cases which would not be cases of acquittal but for the Code. Having thus altered the strictly legal signification of the term in regard to those instances not by any definition of the term in section 403 but by provisions in other parts of the Code, it was necessary for the Legislature to guard against the term being extended to cases not contemplated to be comprehended by it and to which the plea of *autrefois acquit* was in its strictly technical aspect not applicable. It was for this purpose that the explanation to section 403 seems to have been added, but not, I take it, with the object of barring resort to a plea analogous to *autrefois acquit* in cases where such plea ought to be allowed on grounds of justice. But Mr. Rangachariar reads the words "is not an acquittal for the purposes of this section" in explanation to section 403 as equivalent to "in no way bars a fresh prosecution for the same offence" or words to that effect. Is it right to attribute to the Legislature an intention to leave, say, a person discharged by a Magistrate having jurisdiction to be proceeded against a second time, for the same offence, subject to no qualification whatever? That could be right if the maxim *nemo bis vexari* would not be thereby contravened. The observation of Bishop quoted above that legal jeopardy begins when the jury is empanelled and there is no obstacle to the trial of the prisoner being proceeded with has reference to "a system where trials are before a jury and the anterior proceedings are in the nature of non-judicial investigations. (Cf. Stephen's 'History of the Criminal Law of England,' vol. I, p. 497.) But under our Criminal Procedure Code even in cases committable to a Court of Session the enquiries by a Magistrate are judicial proceedings (section (m) of the Criminal Procedure Code) and in cases triable by himself, his enquiries are of course none the less so. Ninety-nine out of a hundred of these cases are triable without jury and therefore the jeopardy in connection with the matter under consideration cannot but be held to attach at all events the moment an accused person appears before a Magistrate.

whether under a warrant or a summons and the case is ready for the prosecution evidence being taken. It is impossible, therefore, to say that either in fact or in point of law, an accused person who has once been discharged and who is put up again before the Magistrate for the same offence is not in jeopardy within the spirit of the rule *nemo bis vexari* and, consequently, it is unreasonable to suppose that the Legislature implied that an accused person who had been discharged by a Magistrate, having jurisdiction, is not exposed to jeopardy a second time in being proceeded with for the same offence, and therefore meant to lay down that a plea analogous to *autrefois acquit* was unavailable in such cases. That in theory the Legislature looked upon a discharge as standing on an almost equal footing with an acquittal cannot be shown more emphatically than it is by section 250 of the Criminal Procedure Code though that section deals only with offences triable by Magistrates. The provision made thereby that a Magistrate may award compensation to the accused person not only when he is acquitted but likewise when he is discharged is not consistent with any other view. It is impossible to justify such an award if the theory of the Code is that the discharge of an accused is virtually no better than a stay of proceedings which will cease when the complainant or the Magistrate chooses to move in the matter. If it be asked, why then maintain any distinction between "acquittal" and "discharge" with reference to an accused's right to set up former jeopardy, the answer, obviously, is that acquittal, as a decision arrived at after a fuller enquiry than that in which the discharge is ordered ought to carry with it the comparatively important right of enabling the accused to rely on the plea of *autrefois acquit* instead of one in the nature of or analogous to such a defence. Cases of dismissal of complaint under section 203 stand more or less on a similar footing to cases of discharge for our present purpose, and the only proper intention to be attributed to the Legislature is that it did not permit the commencement of fresh proceedings in respect of the same offence so long as the order of discharge or the order of dismissal remains in force, ample provision having been made in section 437 for setting aside such orders in revision. No doubt the above reasoning will not apply to the other two cases referred to in the explanation to section 403, viz., stay of proceedings under section 249 and entry under section 273. What the preliminaries are for

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the continuation of proceedings stayed, or renewal of the charge on which entry is made, are matters unprovided for expressly in any part of the Code and on general principles the Magistrate who ordered the stay of proceedings under section 249 may for good reasons remove the stay and proceed further; and as regards the entry under section 273 the High Court may likewise remove the stay and sanction the case to go on. It may not be perhaps out of place to add that the English Criminal Procedure also, though it is less homogenous than the Indian Criminal Procedure Code does not tolerate the anomaly of a complainant renewing his accusation repeatedly inasmuch as a prosecution once launched must proceed until it runs out its course. Sir F. Stephen says: "The unlimited power to institute prosecutions does not carry with it an unlimited control over them when they are instituted. When a charge has been made the maker of it is usually bound over to prosecute, and when a bill has been sent before the grand jury, the matter is entirely out of the original prosecutor's hands and must run its course, unless the Court before which it is to be tried sanctions the withdrawal of the charge, or unless the Attorney-General as the representative of the Crown, the nominal prosecutor, enters a *nolle prosequi*, which operates not as an acquittal, but as a stay of proceedings upon the particular case to which it refers"—'History of the Criminal Law of England,' vol. I, p. 496 (see also *ib.*).

It must be further noted that in the matter of the conduct of prosecutions the latitude allowed to a private individual under the Indian law is more limited than that accorded to him in England. Referring to it, the same learned author writes:—"The right to prosecute for criminal offences is not, properly speaking, left in India, as it is in England, in the hands of private persons. A person who wishes to prosecute another may complain to a Magistrate, but there is nobody like a grand jury before which he can send up a bill, and if he does complain and his complaint is admitted he is not entitled without the Magistrate's permission, to conduct the prosecution." ('History of the Criminal Law of England,' vol. III, p. 329.) How then can it be reasonably argued that when the complaint is *not admitted* our Code implies that the complainant has power to set the law in motion again and again, notwithstanding that the order dismissing the complaint remains unreversed.

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Passing now to the other assumption on which the view I am controverting rests, viz., that a Magistrate in the circumstances stated in the opening part of this judgment has power to revise his own order dismissing the complaint or discharging the accused with a view to revive the prosecution. Certainly such power is not inherent in a Magistrate. As pointed out by me in *Rajah Parthasarathi Appa Row v. Rajah Rengiah Appa Row*(1), inherent power must not be presumed to exist and could not be invoked "except for the limited purpose of preserving and enforcing order, securing efficiency and preventing abuse of process in the exercise of a jurisdiction which the Court otherwise possesses." The passage in *Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad*(2) relied on bears upon one of the classes of cases referred to above as admitting of the presumption of inherent powers. The case of *In re Samsudin* (3) is an instance where it was properly held that it was competent for the Court to recall its process, for the same having been issued in a case where the requisite sanction had not been obtained, the issue of the process was in a sense without jurisdiction and therefore the recall thereof was necessary as otherwise the process of the Court would be abused. How such precedents help the contention of Mr. Rangachariar in the present case, it is difficult to see. It is clear therefore that no inherent power to revise an order of dismissal or discharge made by a Magistrate in the due exercise of his powers under the Code can be rightly taken to exist and the power if any to revise in such circumstances should be given expressly by statute (see, e.g., *In re Harial Buch*(4). The Code itself implies this as for instance in section 144, clause 4, and section 489. Surely, if the Magistrate can be said to have inherent power to set aside an order of discharge it cannot be denied that he can revise orders passed under numerous other sections of the Code, viz., 125, 136, 137, 140, 146 (clause 2), 147, 195, 250, 488 (clause 1), 517, 519, 522, but that certainly is absurd.

Mr. Rangachariar's argument that an order dismissing the complaint or discharging the accused is not a final order requires no serious notice. The order is as final as a judgment of acquittal is final so long as it is not set aside by an authority competent to

(1) I.L.R., 27 Mad., 168 at p. 175.

(2) I.L.R., 22 Bom., 711.

(3) 14 M.I.A., 40 at p. 48.

(4) I.L.R., 22 Bom., 849.

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do so under the Code. That a prosecution for a false charge under section 211, Indian Penal Code, lies on the dismissal of a complaint or the discharge of an accused is practically conclusive of this view.

It follows therefore whether looked at with reference to the right of the prosecutor or the competency of the Magistrate, an order dismissing a complaint or discharging an accused precludes the same matter from being enquired into so long as such order remains in force. I would therefore set aside the committal in question as contrary to law on the ground that the Head Assistant Magistrate had no power to re-entertain the complaint as he did.

DAVIES, J.—I must express my entire concurrence with the judgment of Mr. Justice Subrahmania Ayyar to which I have nothing to add.

BENSON, J.—In this case the Head Assistant Magistrate dismissed a complaint under section 203, Criminal Procedure Code, on the ground that no offence was disclosed.

This opinion was wrong, and on the complainant explaining this to the Magistrate the same day, the Magistrate proceeded to rehear the complaint and deal with it on the merits.

The Sessions Judge thought he had no power to do so, unless and until the order of dismissal had been set aside by a superior Court under section 437, Criminal Procedure Code. In support of this view he relied on the case in *Mahomed Abdul Mennan v. Panduranga Row*(1) which follows the case in Weir, pp. 874-5, *Queen-Empress v. Adam Khan*(2) and *Nibratan Sen v. Jogesh Chundra Bhattacharjee*(3) and requested that the commitment might be quashed.

The conclusion arrived at by the learned Chief Justice is in accordance with the view which I expressed when proposing a reference to the Full Bench, and having now had the advantage of hearing the question fully argued I think that that view is correct.

I then pointed out that in *all* the cases relied on by the Sessions Judge it was a *different* Magistrate of co-ordinate jurisdiction who entertained the second complaint, and that in the Allahabad case the Judges expressly guarded against its being supposed that they ruled that the *same* Magistrate might not re-entertain a

(1) I.L.R., 28 Mad., 255.

(2) I.L.R., 22 All., 106.

(3) I.L.R., 23 Cal., 988.

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complaint on sufficient ground being shown, and expressly refrained from dissenting from a decision of their Court in that sense in *Queen-Empress v. Puran*(1). The question was examined at great length by the Full Bench of the Calcutta High Court in the case in *Dwarka Nath Mondul v. Beni Madhab Banerjee*(2) (seven Judges) as regards Presidency Magistrates and in the case in *Mir Ahwad Hossein v. Mahomed Askari*(3) (five Judges) as regards mofussil Magistrates, and in these it was decided (only one Judge in each case dissenting) that dismissal by a Magistrate under section 203, Criminal Procedure Code, was no bar to a rehearing by the same Magistrate. They did not decide whether it would bar a rehearing by a different Magistrate.

In the present case it is the *same* Magistrate who reheard the case, and, therefore, the rulings in *Mahomed Abdul Mennan v. Panduranga Row*(4) and in Weir, p. 874, do not apply.

The question must, I think, be determined by a reference to the provisions of the law under which the Magistrate is empowered to take cognizance of offences and entertain complaints. A Magistrate under the Code of Criminal Procedure in India is not a mere Judge whose duty is confined to deciding cases brought before him by contending litigants. Under section 190, Criminal Procedure Code, he has jurisdiction to take cognizance of any offence not only upon a complaint, or upon a police report, but also upon his own knowledge, or information or even suspicion that an offence has been committed.

He has, in fact, jurisdiction to bring offenders to justice for the protection of the public and in the interest of the public and he can exercise that jurisdiction unless any provision of the Code or general principle of the criminal law restricts its exercise. There is no provision of the Code which declares that the dismissal of a complaint under section 203 shall bar the Magistrate's jurisdiction to bring the offender to justice.

Section 403 only refers to previous acquittals or convictions and is expressly declared in the Code itself not to apply to the dismissal of a complaint and certain other non-final orders; and the only other section that might be supposed to apply, viz., section 437 is an *enabling* section which permits superior Courts to revise

(1) I.L.R., 9, All., 85.

(3) I.L.R., 29 Cal., 726.

(2) I.L.R., 28 Cal., 652.

(4) I.L.R., 28 Mad., 255.

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and control the exercise of their powers by the Magistrates having original jurisdiction. Such an enabling section cannot in my opinion be held to restrict by implication the exercise by a Magistrate of the powers given to him by the Code.

Section 249 gives a Magistrate power to stop proceedings and to discharge the accused in any case instituted otherwise than upon complaint, and I do not think that it has ever been doubted that the Magistrate can revive proceedings stayed under this section if circumstances justify his doing so. If he has that power in regard to cases not instituted on complaint it is difficult to see why his powers should be less because the case has been instituted on complaint and has been dismissed, as in this case, for no sufficient reason, but merely because the Magistrate misunderstood what the complaint really was.

No general principle of the criminal law such as *nemo bis reus*, is infringed, for, in the present case, no process had been issued, and the accused did not even know that a complaint had been made against him.

Moreover, the history of the legislation embodied in section 403 and the corresponding provision of the earlier Codes seems to show, as pointed out in the judgment of the learned Chief Justice, that the Indian Legislature deliberately restricted the application of the doctrine to cases of acquittal or to cases in which the order of the Court is declared by the Code to have the effect of, or to operate as an acquittal.

The principle appears to be that unless the proceedings have reached such a stage of finality that an acquittal is recorded or that an order is made which the Code declares shall operate as an acquittal, there is no bar.

To extend the doctrine, in effect, to all cases in which a complaint has been dismissed under section 203, or an accused has been discharged, is not warranted by the Code, and, in fact, introduces restrictions on the powers with which the Code invests Magistrates in order to bring offenders to justice.

I concur in the judgment of the learned Chief Justice and would direct the Sessions Judge to proceed with the trial.

MOORE, J.—On the 21st July 1905 one Chinnaya Gounden presented a complaint to a Sub-Divisional Magistrate (Head Assistant Magistrate, Coimbatore). On the same day, the Magistrate examined the complainant under section 200, Criminal

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Procedure Code, and then and there dismissed the complaint under section 203, Criminal Procedure Code, on the ground that no offence had been committed. Later on the same day Chinnaya presented a petition to the same Magistrate in which he represented that his complaint was that the accused persons had committed forgery and prayed that that complaint might be taken on the file and enquired into. The Magistrate accordingly on the same day a second time examined the complainant under section 200, Criminal Procedure Code, and having, as a result of that examination, ascertained that he had made a mistake in dismissing the complaint under section 203, Criminal Procedure Code, on the 24th July made the following order :—"The offence complained of falls under section 467 of the Indian Penal Code besides the minor sections 419 and 468, Indian Penal Code. Forwarded to the Stationary Sub-Magistrate of Pollachi, for enquiry and commitment to the Court of Session if a *prima facie* case is made out." The Sessions Judge has referred the case to this Court on the ground that the Magistrate had "no jurisdiction to revive the proceedings, and his order of 24th July referring the case to the Stationary Sub-Magistrate for enquiry was made without jurisdiction and did not give jurisdiction to the Sub-Magistrate." I have no hesitation in holding that the procedure adopted by the Magistrate was perfectly legal. I follow the decision in *Dwarka Nath Mondul v. Beni Madhab Banerjee*(1) and in *Mir Ahwad Hossein v. Mahomed Askari*(2) and dissent from that in *Mahomed Abdul Mennan v. Panduranga Row*(3). I do not consider it necessary to give any reasons for arriving at this conclusion at any length as they are fully set out in the judgment just delivered by the learned Chief Justice with which I, in the main, concur. I wish however to state clearly in order to avoid all possibility of misunderstanding that the opinion that I have arrived at is with reference to the dismissal of a complaint under section 203, Criminal Procedure Code, and that I avoid giving any opinion as to cases in which accused persons are discharged under section 253 or 259, Criminal Procedure. I will now touch briefly on one or two of the arguments put forward in support of the proposition that the action of the Magistrate was contrary to law. It is pleaded that his procedure

(1) I.L.R., 28 Cal., 652.

(2) I.L.R., 29 Cal., 726.

(3) I.L.R., 28 Mad., 255.

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offends against the maxim *nemo bis vexari*, etc. This may be a good argument where an accused person has been discharged under section 253, Criminal Procedure Code, or 259, Criminal Procedure Code; but it is clear that it has no application to a case where a complaint is dismissed under section 203, Criminal Procedure Code. The persons against whom Chinnaya Gounden complained were in no way vexed in consequence of the complaint which the Head Assistant Magistrate dismissed under that section on the 21st July. Allusion has also been made to section 250, Criminal Procedure Code. On referring to the wording of that section it will be found that the persons against whom Chinnaya Gounden complained could not have obtained compensation in respect to the complaint dismissed under section 203 as they were not either discharged or acquitted. Another argument that has been advanced is that if it is declared that the action of the Head Assistant Magistrate in the present case was legal there will be nothing to prevent a Magistrate from dismissing a complaint every day for, say, a month under section 203, Criminal Procedure Code, and at the end of that time committing the case to the Court of Sessions. It might be urged with equal force that there is nothing to prevent a Third-class Magistrate in this Presidency from committing every petty case of assault or nuisance that comes before him to the Court of Sessions. To advance arguments such as this is to ignore the main principle on which the Criminal Procedure Code is based, namely, that it is the duty of a District Magistrate to see that all the Magistrates in the district exercise the powers conferred on them not only in accordance with law but also in an equitable and rational manner.

I would answer this reference by informing the Sessions Judge that the committal to his Court of the persons named in his letter of reference is legal and has not been passed without jurisdiction.

APPELLATE CRIMINAL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Boddam.*

ISMAL ROWTHER AND OTHERS (ACCUSED), PETITIONERS,

v.

SHUNMUGAVELU NADAN (COMPLAINANT), RESPONDENT.*

1905.
September
25.

Criminal Procedure Code—Act V of 1898, ss. 195, 537—Sanction, want of, only an irregularity and not fatal to the prosecution.

The general provisions of section 195 of the Code of Criminal Procedure ought not to be so construed as to nullify the special provisions of section 537 (b).

The want of sanction required by section 195 of the Code of Criminal Procedure is not fatal to a prosecution unless the accused is prejudiced thereby.

Raj Chunder Mozumdar v. Gour Chunder Mozumdar, (I.L.R., 22 Cal., 176), dissented from.

THE charge against the petitioners (accused) was that they by force obstructed a marriage procession which was being carried on with the sanction and under the superintendence of the police, and compelled the bride and bridegroom to alight from their palanquin and walk to their house. They were convicted of offences under sections 143, 186 and 341 of the Indian Penal Code.

On appeal to the Sub-Divisional Magistrate, the contention of the petitioners that the conviction under section 186 was bad as no sanction had been obtained under section 195 of the Code of Criminal Procedure was overruled and the conviction confirmed.

Petitioners preferred the criminal revision petition.

Mr. E. Norton and P. Duraiswamy Ayyangar for petitioners.

The Public Prosecutor and Mr. Joseph Satya Nadar for complainant.

ORDER.—One of the offences for which the petitioners have been convicted is punishable under section 188, Indian Penal Code.

* Criminal Revision Case No. 234 of 1905, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of O. G. Mackay, Esq., Sub-Divisional Magistrate of Ramnad, in Criminal Appeal No. 176 of 1904, presented against the conviction and sentence of M.B.Ry. V. Swaminatha Ayyar, Second-class Magistrate of Mudukulathur, in Calendar Case No. 243 of 1904.

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No sanction from the Police officers obstructed was produced in the course of the prosecution but no objection on this ground was taken on behalf of the petitioners at the trial. Mr. Norton has called our attention to *Raj Chunder Mozumdar v. Gour Chunder Mozumdar*(1) in support of his contention that the want of sanction was fatal to the prosecution of the prisoners on the charge in respect of the offence referred to. We are unable to agree with the view there taken by the learned Judges as to the construction of section 537, Criminal Procedure Code of 1882, which so far as the question of want of sanction is concerned is identical with section 537 of the present Code (Act V of 1898). Their construction virtually nullifies the provision that want of sanction is merely an irregularity which would not justify the reversal of the decision in a case prosecuted without sanction unless such want of sanction has occasioned a failure of justice. No doubt section 537 begins with the words "subject to the provisions hereinbefore contained," etc., but those words must be taken together with what follows and not read so as to give no meaning to the subsequent clause relating to the want of sanction.

Section 195, provides generally for cases in which sanction is necessary, while section 537 (b) provides for cases of want of or irregularity in the matter of sanction in particular cases. The latter as providing for a special case must have effect given to it as qualifying the general provisions in the earlier section. In this view there is nothing to show that the want of sanction caused any prejudice to the accused or occasioned any failure of justice. And no other ground has been shown for interfering with the decision of the lower Courts.

We dismiss the petition.

(1) I.L.R., 22 Cal., 176.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmaniam Ayyar and Mr. Justice Davies.

KRISTNAM SOORAYA AND ANOTHER (PLAINTIFF AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

1905.
August 22.
November 9.

v.

PATHMA BEE AND ANOTHER (DEFENDANTS NOS. 2 AND 1)
RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 283—Suit brought under section 283 not liable to dismissal because no further relief asked—Specific Relief Act I of 1877, s. 42.

The special right conferred by section 283 of the Code of Civil Procedure on a claimant whose claim is rejected, to sue for a declaration of his title in so far as it is affected by the order passed against him is not controlled by the proviso to section 42 of the Specific Relief Act; and the plaintiff in such a suit is not bound to ask for any further relief to which he may be entitled.

Kunhiamma v. Kunhunni, (I.L.R., 16 Mad., 140), overruled.

Ambu v. Kettilamma, (I.L.R., 14 Mad., 23), followed.

SUIT to establish the plaintiff's mortgage right in certain lands. The facts necessary for this report are set out in the judgment of the District Judge which is as follows:—

"When second defendant attached certain immoveables in execution of a decree for money she had obtained against first defendant, plaintiff presented a claim based on the mortgage which is the subject matter of this suit, as made to him by first defendant. The claim having been rejected plaintiff brought this suit, confessedly, under section 283, Civil Procedure Code, for a declaration of his right as mortgagee to the attached properties and for the cancellation of the order of rejection.

"The first objection that strikes one at the outset is that such a suit is not maintainable (*Kunhiamma v. Kunhunni*(1)). Plaintiff ought to have sued for the recovery of the money by sale of the properties. I have ascertained that the mortgage deed provides

* Second Appeal No. 338 of 1903, presented against the decree of S. Gopalachariar, Esq., District Judge of Cuddapah, in Appeal Suit No. 144 of 1901, presented against the decree of E. J. S. White, Esq., District Munsif of Cuddapah, in Original Suit No. 621 of 1899.

(1) I.L.R., 16 Mad., 140.

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for the payment of the money on demand. Hence the suit is clearly opposed to section 42 of the Specific Relief Act.

"It is unnecessary to refer the other points in the case.

"This appeal of second defendant is allowed with costs on the said ground and the decree of the lower Court is reversed and plaintiff's suit is dismissed, but without costs as this objection was not taken by second defendant there."

The case came in the first instance before Davies and Benson, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The decision relied on by the District Judge (*Kunhiamma v. Kunhunni*(1)) is, we think, an authority applicable to the facts of the case before us; but we have doubts as to its correctness. A different view was taken by Muttusami Iyer, J., in *Ambu v. Kettilamma*(2).

We, therefore, refer for the Full Bench decision whether on the facts stated by the District Judge in this case, the suit is sustainable with reference to section 42 of the Specific Relief Act.

The case came on for hearing in due course before the Full Bench constituted as above.

S. Gopalaswami Ayyangar for second appellant.

K. Srinivasa Ayyangar for first respondent.

The Court expressed the following

OPINION.—On the facts stated by the District Judge we are of opinion that the suit is sustainable. We are unable to accept the view taken by the learned Judges in the case (*Kunhiamma v. Kunhunni*(1)).

In our opinion the proviso to section 42 of the Specific Relief Act does not operate so as to take away from a party against whom an order has been made under sections 280, 281 or 282 of the Code of Civil Procedure, the special right conferred by section 283 to sue for a declaration of his title in so far as it is affected by the order which he seeks to impeach.

We think the law on this question was correctly laid down by Muttusami Iyer, J., in his judgment in *Ambu v. Kettilamma*(2).

The appeal came on for final hearing in due course before Davies and Benson, JJ., when the Court delivered the following

(1) I.L.R., 16 Mad., 140.

(2) I.L.R., 14 Mad., 23 at p. 25.

JUDGMENT.—We cannot accede to the argument now urged before us that there was no order under section 282 of the Code of Civil Procedure against the appellant, and therefore no basis for a declaratory suit under section 283 of the Code of Civil Procedure. In accordance with the decision of the Full Bench we set aside the decree of the lower Appellate Court and remand the appeal for disposal on the merits. Costs will abide and follow the result.

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PATHMA BEE.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

THRIKAIKAT MADATHIL RAMAN (PLAINTIFF), APPELLANT,
v.

1905.
March 20.
November 10.

THIRUTHIYIL KRISHNEN NAIR AND OTHERS (DEFENDANTS
Nos. 1 to 6, 8, 10, 11, 12, 14 AND 17 TO 27), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 43 and s. 13, *explan. II*—Suit on one mortgage no bar to subsequent suit on another mortgage of same property.

A suit brought by A against B on an alleged mortgage, which was dismissed, is no bar to another suit by A against B on another mortgage in respect of the same properties under sections 43 and 13 of the Code of Civil Procedure.

Rangasami Pillai v. Krishna Pillai, (I.L.R., 22 Mad., 259), overruled.

Ramaswami Ayyar v. Vythinatha Ayyar, (I.L.R., 26 Mad., 760), followed.

Veerana Pillai v. Muthukumara Asary, (I.L.R., 27 Mad., 102), followed.

THE facts and the question raised are fully set out (by Subrahmania Ayyar and Benson, JJ.) in the following

ORDER OF REFERENCE TO A FULL BENCH.—The previous suit, Original Suit No. 91 of 1895, was brought on an alleged mortgage of 1860 by the plaintiff's predecessor to the tarwad of the defendants Nos. 1 to 13. That suit was dismissed on the ground that the mortgage sued on was not true. The present suit is brought on a mortgage of 1854. The lower Courts hold that the present suit is barred both under section 13 and under section 43 of the

* Second Appeal No. 1059 of 1901, presented against the decree of M.R.Ry. K. Krishna Rau, Subordinate Judge of Calicut, in Appeal Suit No. 618 of 1900, presented against the decree of M.R.Ry. M. Babu Rau, District Munsif of Calicut in Original Suit No. 976 of 1899.

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Civil Procedure Code and they rely on *Rangasami Pillai v. Krishna Pillai*(1). In *Ramaswami Ayyar v. Vythinatha Ayyar*(2) the decision in *Rangasami Pillai v. Krishna Pillai*(1) was regarded as inconsistent with the decision of the Privy Council in *Amanat Bibi v. Imdad Husain*(3) and subsequent decisions of this Court. But in a recent case in *Pelpaya Bhattathiripad v. Thambu Nair*(4) a Division Bench stated that *Rangasami Pillai v. Krishna Pillai*(1) was rightly decided. The decision in *Ramaswami Ayyar v. Vythinatha Ayyar*(2) was followed in *Veerana Pillai v. Muthukumara Asary*(5). In this conflict of decisions we refer for the decision of a Full Bench the following question:—

Whether the present suit is barred under section 13 or 43, Civil Procedure Code, or under both.

The case came on for hearing before the Full Bench constituted as above.

C. V. Anantakrishna Ayyar for P. R. Sundara Ayyar for appellant.

K. P. Govinda Menon for respondents Nos. 17 and 19 to 22.

The Court expressed the following

OPINION.—The contract on which the plaintiff sued in the present suit is distinct from that on which he sued in Original Suit No. 91 of 1895. In the suit of 1895 the plaintiff included the whole of the claim which he was entitled to make in respect of the alleged cause of action on which he sued (section 43). His claim in the present suit on the mortgage of 1854 is not a matter which might and ought to have been made a ground of attack in his previous suit on the alleged mortgage of 1860 (section 13, explanation II).

There is a strong body of authority to support this view. The law was exhaustively considered in *Ramaswami Ayyar v. Vythinatha Ayyar*(2). We agree with the decision in that case and with the decision in the later case of *Veerana Pillai v. Muthukumara Asary*(5), which followed *Ramaswami Ayyar v. Vythinatha Ayyar*(2).

Having regard to the current of authority we do not think the judgment in the case in *Rangasami Pillai v. Krishna Pillai*(1) can be treated as binding.

(1) I.L.R., 22 Mad., 259.

(3) I.L.R., 15 Calc., 800.

(5) I.L.R., 27 Mad., 102.

(2) I.L.R., 26 Mad., 780.

(4) Second Appeal No. 446 of 1902 (unreported).

We are of opinion that the present suit is not barred under section 13 or section 43 of the Civil Procedure Code.

The appeal came on for final hearing in due course before Subrahmania Ayyar and Benson, JJ., when the Court delivered the following

JUDGMENT.—In accordance with the decision of the Full Bench we set aside the decree of the Courts below and remand the appeal to the lower Appellate Court for disposal according to law. Costs in this Court will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Boddam.

CHINNAM RAJAMANNAR AND ANOTHER (DEFENDANTS Nos. 1 AND 3), APPELLANTS,

v.

TADIKONDA RAMACHENDRA RAO AND ANOTHER (FIRST PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Will, construction of—'Labham,' meaning of—*Transfer of Property Act IV of 1882, s. 35 (b)*—Exception not applicable where debt not the whole consideration—*Probate and Administration Act V of 1881, ss. 128, 130, 131*—Interest allowable on demonstrative legacies—*Demonstrative legatee, right of to resort to general assets.*

The word 'Labham' is generic and covers different kinds of profit and in its ordinary and comprehensive sense means profit, gain or income as opposed to the corpus yielding the same and includes interest and dividends and income from immoveable property, especially where other portions of the will show such to have been the intention of the testator.

The exception in paragraph (b) of section 135 of the *Transfer of Property Act* will apply only where the whole of the consideration for the transfer is a debt due by the transferor.

The rule that in the case of demonstrative legacies, the legatee is entitled to resort to the general assets on failure of the source intended will not apply where there are directions to the contrary by the testator.

* Appeal No. 67 of 1904, presented against the decree of M.R.By. I. L. Narayana Rao, Subordinate Judge of Kiatna at Masulipatam, in Original Suit No. 9 of 1899.

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October
12, 13.
November
2.

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Under the English Law, interest is payable on demonstrative legacies from the expiry of one year from the testator's death.

Mullins v. Smith, (1 Drewry & Smale's Rep., 204), approved and followed.

Lord Lonsborough v. Somerville, (19 Beav., 265), approved and followed.

The same is the law in India and the absence of a distinct provision in sections 128, 130, and 131 of the Probate and Administration Act with respect to interest on such legacies does not imply an intention to disallow interest in such cases.

THIS was a suit instituted by the plaintiffs for the administration of the estate of one C.V. deceased against the first defendant who was the son of C.V. and defendants Nos. 2 and 3 who were the executors in possession of the estate, and for payment to the plaintiffs of legacies bequeathed to them by C.V., and of legacies to others of which they had obtained transfers.

C.V. who died in September 1888, made his last will and testament in April 1887 and subsequently executed no less than five codicils.

By his last will he directed among other things—

(1) That Rs. 15,000 should be paid in cash to L.V.

(2) That Rs. 3,000 should be invested at interest and the profits therefrom should be paid to A.L. sister of the testator, the principal amount to be paid to her son V.R. on his attaining his majority.

(3) That Rs. 500 should be given to each of the plaintiffs for their marriages.

The will provided that the remaining properties should be delivered to the first defendant on his attaining his twentieth year.

The mode of paying the legacies is provided for by codicil 4, the material portion of which is as follows:—

"Excluding the amounts payable to Venkata Krishnaya and Subba Lakshmi and for the abovementioned scholarship of Rs. 5,000 the money payable for the other items shall be debited against and discharged from the profits derived from the business or transactions belonging to Venkanna Garu and myself. But it shall not be out of the principal This will shall be carried out until the boy attains his proper age, *i.e.*, 20 years but not afterwards. The opinion of the members may be given effect to in all matters whenever necessary."

The plaintiffs obtained an assignment of the legacy to L.V. of Rs. 15,000 in July 1898 for Rs. 13,000 being made up of Rs. 12,000 due to them by L.V. and Rs. 1,000 paid in cash.

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The plaintiffs also obtained an assignment of the legacy to V.R. of Rs. 3,000. This was also in July 1898 and was for a consideration of Rs. 3,500.

The plaintiffs in this suit claimed the full amount of these legacies with interest from the time they were payable and the amount with interest of the legacies devised to them.

The Subordinate Judge passed a preliminary decree in favour of the plaintiffs for the principal amount of the suit legacies and also for interest on the two legacies for Rs. 1,000 and Rs. 3,500 from such time as funds for paying the same were available, and interest on all legacies from date of decree. Accounts were directed to be taken of the profits available for payment of the legacies.

The defendants preferred this appeal and a memorandum of objections was filed by the plaintiffs.

The principal questions involved in the appeal were, whether under section 135 (b) of the Transfer of Property Act, the plaintiffs could recover on account of the legacy to L.V. assigned to them only the amount actually paid with interest; whether the legacies were payable out of the profits of trade alone or out of interest and the income of immoveable properties also; whether the legacies were payable out of the general assets, and the time from which the plaintiffs were entitled to interest.

P. Nagabhushanam for appellants.

The Advocate-General (Hon. Mr. J. P. Wallis) and Dr. S. Swaminadhan for first respondent.

JUDGMENT.—The will and the codicils upon the construction of which the questions raised in this case depend are not very felicitously drawn, and the number of codicils which have succeeded each other (five in number) add to the difficulty of construing them. A great deal of the judgment of the lower Court was devoted and much of the argument on behalf of the appellants was directed to the construction of paragraphs 13 and 14 of the will. We think it unnecessary to consider this matter as codicil No. 4 is sufficient for the disposal of the main question in the case. The material part of it runs thus: "Excluding the amount payable to Venkata Krishnayagaru and Subba Lakshmi, and for the abovementioned scholarship of Rs. 5,000, the money payable for the other items shall be debited against and discharged from the profits derived from the business or transactions belonging to

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Venkannagaru and myself. But it shall not be out of the principal. This will shall be carried out until the boy attains his proper age, *i.e.*, twenty years but not afterwards. The opinion of the members may be given effect to in all matters whenever necessary."

The contention on behalf of the plaintiffs is, that the legacies given by the testator other than the three expressly excluded in the above passage, were payable from the entire income or profits derived from the estate held jointly by the testator and his partner Venkannagaru, moveable or unmoveable. The contention on behalf of the defendants is that they are payable only out of profits realised up to the time the first defendant attained his 20th year (such) profits being exclusive of interest received as such upon the capital employed in the business and also exclusive of the dividends of certain mill shares held by the partners as well as the income of the immoveable property held by them jointly. The contention on behalf of the plaintiffs is, in our opinion, correct. As regards the defendant's objection that the payments on account of the legacies are to cease as soon as the first defendant attains the age of twenty years, reliance is placed upon the clause "this will shall be carried out until the boy attains his proper age, *i.e.*, twenty years but not afterwards." The argument of the Advocate-General that this passage means nothing more than that the executors were to cease to manage when the first defendant attained twenty years is supported by the next following sentence which provides for the executors opinion being obtained even subsequent to that period. Further, paragraphs 6, 7, 8 and 9 of the will also go strongly to support this argument on behalf of the plaintiffs since they contain provisions for payments which, from their very nature, might have to be made after the first defendant attained the age of twenty years.

As regards the defendant's other contention that the interest on the capital, the dividends on the shares and the income of the immoveable property should be excluded from the profits out of which the legacies were to be paid, it is clearly opposed to the ordinary meaning of the vernacular term "labham" translated in the above quotation as profits. It is a very generic expression covering different kinds of profit or gain and that it included profit by way of interest in the view of the testator himself in connection with these testamentary instruments is clear from paragraphs 8 and

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9 of the will where he directs certain amounts to be laid out at interest and uses the term "labham" in respect of the interest thus to accrue. The second paragraph of the fifth codicil equally confirms this view. In the sentence "in the event of his carrying on a different trade, the profits or losses whereof shall also belong to him," the term used is "labham" and from the context it is impossible to doubt that it is used in its widest possible sense. It follows, therefore, that the term in question was not intended to be used in the fourth codicil in any, but its ordinary and comprehensive sense of profit, gain or income as opposed to the corpus yielding the same.

The next point is as to the amount due to the plaintiffs in respect of the legacy transferred to them under Exhibit B. We are unable to accede to the view urged on behalf of the plaintiffs that the case is within the exception in paragraph (b) of section 135 of the Transfer of Property Act. No doubt one part of the consideration for the transfer was a debt due by the transferor to the transferees, but the other part was cash paid. The words of the section "where it is made to a creditor in payment of what is due to him" can only apply to cases where the entire consideration is the debt. To hold that the present case is within the words would in effect be varying the language materially and would make the clause run as if the words were "in payment wholly or in part of what is due to him." In this view the plaintiffs will be entitled to receive on this account only Rs. 13,000 with interest thereon at the rate of 12 per cent. per annum which rate, we think, should be allowed as was done by the Subordinate Judge in regard to the amount claimed under another assignment having regard specially to the fact that no less than twelve-thirteenths of the consideration was a debt due to the transferees.

The next point is whether the plaintiffs are entitled to be paid out of the general assets of the testator in the event of the failure of the source from which they were directed to be paid by the testator. No doubt, in the case of demonstrative legacies, the legatee is entitled to resort to the general assets on failure of the source intended, but that rule is of course subject to any direction to the contrary by the testator. It is, our opinion, that there is such a direction in the present case, as the will says, that they "shall not be paid out of the principal." The vernacular term for principal (*asalu*) used here means in the context the

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corpus of his estate. In other words the intention of the testator was that the source from which the legacies were to be discharged was the income of the estate and not any portion of the estate itself.

The last question is as to the interest payable upon the legacies. In the view we have taken of the inapplicability of section 135 (b) of the Transfer of Property Act, the matter is only important as regards the two legacies of Rs. 500 each payable to the plaintiffs. We agree with the Advocate-General that they carry interest at 6 per cent. per annum from the expiry of one year from the death of the testator, and it follows that this interest is payable out of the income or profits from which the principal amount of these legacies is made payable. That, according to English law, demonstrative legacies also carry interest from one year from the testator's death is clear upon the authorities to which our attention has been drawn on behalf of the plaintiffs (see *Mullins v. Smith*(1) and *Lord Londesborough v. Somerville*(2)). We are unable to agree with the suggestion on behalf of the defendants that the Indian Law is different. Section 128 of the Indian Probate and Administration Act provides that the legatee is entitled to the produce of a specific legacy and sections 130 and 131 entitle legatees to interest on general legacies. The absence of a distinct provision in regard to the payment of interest on demonstrative legacies does not imply an intention to disallow interest in such cases. As pointed out in *Mullins v. Smith*(1) *supra*, in the matter of interest, demonstrative legacies are to be viewed as of the nature of general legacies. The total amount due, therefore, to the plaintiffs will be Rs. 1,000 with interest at 6 per cent. per annum from the expiry of one year from the testator's death till date of the lower Court's decree and Rs. 13,000 with interest at 12 per cent. per annum from the 16th July 1898 till the date of the lower Court's decree and the costs of the transfer, and Rs. 3,500 with interest at 12 per cent. per annum from the 1st July 1898 till the date of the lower Court's decree and the costs of the transfer with 6 per cent. per annum upon Rs. 17,500 and costs from the date of the lower Court's decree the date of payment.

It is unnecessary, so far as this case is concerned, to direct any account to be filed as the amount which had accrued as profit and

(1) 1 Drewry & Smale's Rep., 204.

(2) 19 Beav., 295.

which was attached before judgment will alone more than cover these payments.

In modification, therefore, of the decree of the Subordinate Judge we pass a decree for this amount.

Parties will pay and receive proportionate costs throughout, the memo. of objections included.

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APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and
Mr. Justice Sankaran Nair.

MURUGAPPA CHETTI (DEFENDANT), APPELLANT,

v.

NAGAPPA CHETTI AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1905.
September
7.
October
4, 10.

Hindu Law—Adoption—Receipt of consideration by Natural father for giving in adoption does not make the adoption invalid.

Where a boy, being a fit subject for adoption in the Dattaba form, is given and accepted, with the proper ceremonies for such adoption, by persons respectively competent to give and accept him, he acquires the status of an adopted son. The receipt of money by the natural father in consideration of giving his son and the payment of such by the adoptive father, though illegal and opposed to public policy, do not make the adoption invalid, as the gift and acceptance of the boy is a distinct transaction clearly separable from the illegal agreement and payment. Such payment has not the effect of converting the adoption into an 'affiliation by sale,' a form now obsolete.

Manjaneer puthiran is synonymous with Dattaba son.

Bhasba Rabidat Singh v. Indar Kunwar, (I.L.R., 16 Cal., 556), followed.

THE first plaintiff claiming to be the adopted son of the defendant instituted this suit, impleading his minor son as co-plaintiff, for partition of the family properties in the hands of the defendant. The defendant pleaded *inter alia* that the first plaintiff did not acquire the status of an adopted son, as in consideration of a sum of Rs. 6,150 paid to the first plaintiff's natural father, he was added as a *Manjaneer puthiran* into the defendant's family and that, as such practice was opposed to public policy, the first plaintiff could

* Appeal No. 179 of 1903, presented against the decree of M.R.Ry. W. Gopala Chariar, Subordinate Judge of Madras (East) in Original Suit No. 97 of 1901.

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not claim the status of adopted son. The defendant also contended that the properties were his self-acquired properties and were not liable to division. The factum of adoption was proved as well as the fact that the first plaintiff resided with the defendant and was married at the defendant's expense. The payment of Rs. 6,150 was admitted and the Sub-Judge held that it did not vitiate the adoption. The plea of self-acquisition was disallowed and a decree was passed in favour of the plaintiffs. The defendant preferred this appeal.

The Hon'ble Mr. P. S. Sivaswami Ayyar and T.R. Venkata-rama Sastri for appellant.

The Hon'ble Mr. L. A. Govindaragava Ayyar for V. Krishna-swami Ayyar and T. V. Gopalaswamy Mudaliar for respondent.

JUDGMENT.—SUBRAHMANIA AYYAR, Offg. C.J.—The important point for determination in this case is whether the first plaintiff, hereinafter referred to as the plaintiff, is, as found by the Subordinate Judge, the adopted son of the defendant. The oral evidence in the case proves beyond all doubt that the plaintiff was, on or about the 28th October 1887, while a boy of 12 or 13 years of age, formally given in adoption to the defendant and accepted by the latter as his son, and that such gift and acceptance were accompanied by ceremonies usual among the members of the community to which the parties belong, viz., Sudras of the class known as Nattukottai Chetties. That the plaintiff has ever since lived away from his natural home and as a member of the defendant's family is equally well established. It is further shown that the defendant got the plaintiff married and that the issue of that marriage (the second plaintiff) has also grown up as a member of the defendant's family. Mr. Sivaswami Ayyar, on behalf of the defendant, contended that, in spite of all the above circumstances, it should be held that in point of law there was no valid affiliation of the plaintiff as the defendant's son, inasmuch as the natural father of the plaintiff was induced to part with him in consideration of the payment, some short time before the adoption, of the sum of Rs. 6,000 and odd made by the defendant to the natural father. The argument on this point, so far as I followed it, was that the transaction in question was one known to the Hindu Law as the affiliation of a 'son bought,' and as such a form of affiliation is prohibited in modern times, the plaintiff's claim as adopted son must fail.

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As regards the texts and the passages from the commentaries cited by Mr. Sivaswami Ayyar their real effect was that a person buying a child had the power, by the very act of purchase, of conferring upon the child the status of a member of his family without the performance of rites or ceremonies prescribed in the case of an *aurasa* son, though the performance thereof was recommended as productive of religious merit. It is not, however, necessary to pursue this matter, it being unquestionable that the relation of a 'son bought' cannot now be validly created, and inasmuch as the intention of the natural father and of the defendant in the present instance was certainly not to follow that mode of affiliation. Now their intention will clearly be seen to have been to make the plaintiff an adopted son of the *Dattaha* form, and, as the party giving was competent to give, the party taking was entitled to take and the plaintiff himself was a fit subject for gift and acceptance in that form, that intention must be given effect to unless there was something attending the transaction, which under the Hindu law nullified the intention of the parties and prevented the springing up of the status which would otherwise have resulted from it. In the deed which was executed on the day of the adoption by the defendant to the natural father and meant to serve as the written evidence of the transaction, the plaintiff is described as *Manjaneer puthiran*, Tamil words meaning literally "saffron-water-son," but used as synonymous with a *Dattaha* son (see Winslow's Dictionary and compare Mayne on Hindu Law and Usage, sixth edition, page 196 at end of section 154). Further the provisions of the instrument that the adopted boy is entitled to the rights of a son in the estate of the adoptive father and especially the provision that he is to have an equal share with any after-born natural son are most strongly in favour of the above view. The only question then is whether the payment to the natural father of the sum of money referred to, which is admitted, invalidates the adoption. No doubt, whether looked at with reference to general policy or with reference to the spirit underlying the rules of the Hindu Law as regards *Dattaha* adoption, the promise to pay or the payment of money for the purpose of inducing a man to part with his son to another cannot but be reprobated. Still, ought it to be held that the gift and acceptance itself is rendered null and void by the payment of the money? The objections on which stress was laid by Mr. Sivaswami

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Ayyar certainly warrant the view that the person who agrees to pay or pays, and the person who agrees to receive or receives the money are parties to an unlawful agreement and being in *pari delicto* should be held disentitled to seek any relief in Courts of justice by virtue of such agreement or payment. To go further and lay down that the adopted son's status itself is affected thereby would be to confound two transactions, which in the eye of the law are independent of each other; since the transaction of the gift and acceptance which effects the change in the status of the son is clearly separable from the agreement or payment which the law prohibits. In fact the latter bears only on the motives of the party giving and *Rajah Vellanki Venkata Krishna Row v. Venkata Rama Lakshmi Narasayya*(1), and *Mahableshwar v. Durgabai*(2), are authorities against the question of the validity of an adoption being complicated by enquiries into the motives of the parties concerned. It is scarcely necessary to say that a gift or acceptance from motives of a questionable character by a person competent of his own choice to give or accept is distinguishable from the case of acceptance by a widow acting under the authority of a sapinda given for a corrupt consideration.

In the latter case the adoption fails because of the absence of *bonâ fide* authority to take, such authority being an essential constituent of a good adoption by a widow not empowered by her husband to make one.

The view that the payment in question would invalidate the adoption would, of course, result in visiting with highly injurious consequences an innocent third party, for persons given in adoption are almost invariably children incapable of protecting themselves in the matter, and liable to be given away, apart from their wishes, in the exercise of parental authority recognised by the Hindu Law. And where disputes arise, as in this case, many years after the child passes from one family to another, to hold that the adoption itself is bad would subject him to irreparable loss in respect of property and involve him in other difficulties incident to the ties he has formed as a member of the adopter's family. That a rule which makes an agreement to pay or the payment of such a consideration as that in question invalidate the adoption itself would strike at the mischief more effectually than

(1) L.R., 4 I.A., 1 at p. 14.

(2) I.L.R., 22 Bom., 199.

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one which only prohibits the grant of relief in respect of the agreement or the payment, it would be idle to suppose, so long as the sentiments of the people concerned remain what they are. It is abundantly clear from the evidence that in the community to which the parties belong such payments form the rule, and the contrary, the exception. And so long as these men continue to be moved by the desire for the perpetuation of lineage by recourse to the fiction of adoption, the payments will not cease and the consequences of the stricter rule would only be that the payments would be made in secret, and that, when any litigation should ensue with reference to the adoption, it would be attended by the production of untrue evidence, either on the part of persons denying payments that have really taken place or on the part of those who falsely set up such payments. Why the practice of paying money is prevalent largely among these Chetties and is avowed is perhaps not difficult to understand. Their community is a most thriving and prosperous compact little one in this Presidency. Its members are able enterprising traders doing business in India and elsewhere. It is a pride of their community that there is in it none so poor as to depend for his livelihood on the charity of others. Every male child is expected to become an earning man and this expectation is mostly realized. Consequently when a Chetty gives away his son in adoption he is virtually contributing to the wealth of the family of the adoptive father. With the commercial instinct implanted in him, a member of this community sees nothing heinous in a practice which prevents the natural father becoming a loser by giving away his son. It must not, however, be supposed, that the position of the family into which the boy is to pass, the character of his new parents and other considerations bearing on the future welfare of the child are ignored, so as to make the transaction a purely mercenary affair as at first sight it may seem to be to a superficial critic of their institutions. Be this as it may, the view taken by the Judicial Committee in *Bhasba Rabidat Singh v. Indar Kumwar*(1) in regard to an improper condition subject to which an adoption takes place is in favour of the conclusion that the validity of the adoption is unaffected by the payment in question.

(1) I.L.R., 16 Cal., 556.

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The conclusion of the Subordinate Judge that the plaintiff is the validly adopted son of the defendant must be held to be right and it is unnecessary to consider the argument that the defendant is estopped from denying the plaintiff's right as adopted son.

As regards, also the other point raised, viz., whether the property in which a share has been decreed to the plaintiff is the self-acquired property of the defendant, the decision of the Subordinate Judge is correct. The allegation of the defendant that though his father had property yet the whole of it was given away by him to a temple and no portion thereof passed to the defendant is a story entirely unsupported by trustworthy evidence. The testimony of the witnesses examined on behalf of the plaintiff proves that the defendant from his infancy was a member of a joint trading family and got on division his share.

The appeal fails and is dismissed with costs.

SANKARAN NAIR, J.—I agree.

APPELLATE CIVIL.

*Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Boddam.*

KRISHNASWAMI AYYANGAR (PLAINTIFF), APPELLANT,

v.

SIVASWAMI UDAYAR AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Religious Endowments Act XX of 1862, s. 7—Rules under—Election—Giving consideration in return for votes, what amounts to—Payment by candidate of expenses to voters who had undertaken to vote for him disqualifies candidate.

On general principles, as well as under rule 19 of the rules framed by the Local Government for the conduct of elections under section 7 of the Religious Endowments Act XX of 1863, a candidate can be held to "give consideration in return for a vote" only when such consideration passes as the result of a bargain.

* Appeal No. 154 of 1901 presented against the decree of G. F. T. Power, Esq., District Judge of Tanjore, in Original Suit No. 5 of 1899.

Rule 19.—Any person proved to have given, directly or indirectly, any valuable consideration whatever, in return for a vote, shall be thereby disqualified from being elected.

Payment of train fare and carriage expenses by a candidate to voters who had undertaken to vote for him will constitute such payment and such candidate will be disqualified from being elected under the rule.

It will be otherwise where the provision for payment is a unilateral act which might be accepted and acted upon or ignored by the other party.

The burden lies on the candidate so paying of proving that the payments were otherwise than in return for votes.

Cooper v. Slade, (6 H.L.C., 746), referred to.

The Bolton Election Petition, (31 L.T., 194), distinguished.

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A VACANCY having occurred in the Devasthanam Committee of the Temple at Kumbakonam by the death of one of the members, the remaining members defendants Nos. 1 to 6, held an election to fill the vacancy under the provisions of section 10 of Act XX of 1863. The plaintiff and another R were rival candidates. At the end of the poll, the plaintiff having secured the largest number of votes, was declared duly elected by the sixth defendant on behalf of himself and the defendants Nos. 1 to 5.

On the next day a meeting was held at the Committee office at which defendants Nos. 1, 3, 5 and 6 attended and the election of the plaintiff was cancelled. Subsequently another election was held and the seventh defendant was declared duly elected in place of the deceased member. The plaintiff instituted this suit for a declaration that he had been duly elected a member of the Committee and that the election of the seventh defendant was void and illegal.

His case was, that he having secured the majority of the votes and the sixth defendant having made the declaration, the subsequent proceedings were *ultra vires* and illegal, that all the Committee had to do was to announce the result of the election in the manner provided by law and that even in the absence of the declaration by the sixth defendant he was duly elected and entitled to be declared as such.

The defendants pleaded that the plaintiff had been guilty of various malpractices in securing votes and in the conduct of the election; that his election was invalid and that they had the right to cancel it.

The plaintiff admitted having spent Rs. 2,000 or more on the voters, for their travelling expenses, etc., but failed to furnish accounts of the money so spent. The District Judge accordingly held that there was grave reason to suspect that the plaintiff had bought votes, and that his election was invalid under rule 19.

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He consequently refused the declaration and dismissed the plaintiff's suit.

Plaintiff preferred this appeal.

The Advocate-General (Hon. Mr. J. P. Wallis), *V. Krishnaswami Ayyar, P. R. Sundara Ayyar and K. Srinivasa Ayyangar* for appellant.

Mr. E. Norton, *T. V. Seshagiri Ayyar, K. R. Krishnaswami Ayyangar and T. S. Krishna Ayyar* for respondents.

JUDGMENT.—The Advocate-General has argued at length the question of the irregularities referred to by the District Judge as having taken place in the holding of the election. He has also laid great stress upon the members having cancelled the election instead of proceedings to declare the result of it. Having regard to the conclusion we have arrived at with reference to the conduct of the appellant in connection with the election we do not think it necessary to discuss the matter of the irregularities or to give a decision as to the procedure adopted by the members of the Committee, though as at present advised we ought to say they acted altogether beyond the scope of their powers and contrary to their duty in resolving to cancel the election. We think that the appellant is not entitled to the declaration sought for by him inasmuch, as upon the evidence, we hold that he was disqualified to be elected as a member of the Committee with reference to rule 19 of the rules framed by Government under section 7 of Act XX of 1863. The evidence bearing on this point is quite short and consists of statements made by the appellant himself and one of his witnesses. The appellant admitted that he spent in connection with the election Rs. 2,000 or more; and added that he kept no accounts of such expenditure. This was in his cross-examination. In his re-examination he stated: "The sum spent by me for the expenses of myself and my friends and canvassers in touring about the circle was about Rs. 500 and the cost of bringing my voters to Kumbakonam, train fare and cart-hire, etc., was about Rs. 1,500. The voters live in three taluks." The other witness stated: "I saw his (plaintiff's) agent paying the voters their railway fare. Nothing more was paid to them so far as I know. No bribes were paid to them."

It is a matter of some surprise that the witnesses were not examined more in detail as to these expenses. We cannot altogether agree with the suggestion that it lay upon the respondents

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to pursue the matter further. It was equally important for the appellant to place before the Court all the information in his power bearing upon the question so as to remove all suspicion in the matter. The District Judge came to the conclusion that the appellant spent money for the purpose of obtaining votes and acted in breach of rule 19 referred to and we feel compelled to adopt the same view. No doubt, as urged by the Advocate-General, to warrant the appellant being declared disqualified within the meaning of the rule it must clearly appear that money or other valuable consideration was given in return for votes; in other words that such consideration passed as the result of a bargain. This is the only proper view to be taken of the language of the rule itself and that is also the construction to be placed upon the rule with reference to the general principles laid down in the leading case of *Cooper v. Slade*(1) and the subsequent decisions in which that case has been referred to, explained, or distinguished. Those cases turned upon the contents of writings, with reference to which the question whether the payment was made as a matter of bargain had to be decided. The present case is somewhat different in that there is no writing to be construed, and the decision depends upon inferences which we, as Judges of fact, have to draw from the statements of the witnesses already noticed. The case of "*The Bolton Election Petition*"(2) is entirely dissimilar from the present. In that case it was found that there was no bargain at all and that the provision for carriage which was promised was altogether a unilateral act which might be accepted and acted upon or entirely ignored at the option of the other party. Here, admittedly, there was a payment to the voters themselves who had come to Kumbakonam for the very purpose of voting for the appellant and for him alone. This is clear from the appellant describing the parties to whom payments were made as "my voters", and his witness describing them as the appellant's voters. Such language implies a previous understanding as to what their votes were to be and the payment in the circumstances can hardly be treated as otherwise than in return for the votes. If the appellant did not, as he says, keep accounts as regards the money spent by him in connection with

(1) 6 H.L.C., 746.

(2) 81 L.T., 194.

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the election that is not a circumstance which can be treated as in his favour.

Having regard to the reason for the provision in rule 10 it was incumbent upon the appellant to be able to furnish accurate information with reference to payments made by him to voters. His statement in this respect was not confined to railway fare and cart-hire as appears from the word "etc." following upon them in his evidence and this rendered it all the more necessary that the whole expenditure should be fully and duly accounted for if inferences adverse to him were to be excluded.

For these reasons the appeal fails in our opinion and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

1905.
November 24,
25, 29, 30.

SAMINATHAN CHETTIAR AND OTHERS (PLAINTIFFS NOS. 1, 3
AND 4), APPELLANTS,

v.

SWAMIAPPA NAICKER AND OTHERS (FIRST DEFENDANT, LEGAL
REPRESENTATIVES OF SECOND DEFENDANT AND DEFENDANTS NOS. 4
AND 5), RESPONDENTS.*

*Mortgage—Mortgage—Decree, rate of interest in—Contract rate not compulsory
after date fixed for redemption.*

In suits on mortgages, it is not compulsory on the Court to allow the contract rate of interest after the date fixed for redemption by the decree.

Commercial Bank of India v. Ateendralayya, (I.L.R., 23 Mad., 637), followed.

The facts necessary for this report are set out in the judgment.

V. Krishnaswamy Ayyar, K. Srinivasa Ayyangar and R. Sivarama Ayyar for appellants.

S. Srinivasa Ayyangar for second and third respondents.

K. N. Ayya for first respondent.

T. V. Gopalasamy Mudaliar for fifth respondent.

* Appeal No. 166 of 1901, presented against the decree of M.R.By. S. Doraisamy Ayyangar, Subordinate Judge of Tinnevely, in Original Suit No. 65 of 1897.

JUDGMENT [After deciding the questions of fact raised in the case their Lordships proceeded].—The result is that the amount due to the second defendant, the first mortgagee, by the first defendant was Rs. 1,37,115 on the 24th August 1897. He is entitled to recover this sum with interest at 12 per cent. per annum with annual rests from the said date. The amount due to the plaintiff, the subsequent mortgagee, by the first defendant was Rs. 20,452 on the 1st February 1897. He is entitled to recover this sum with interest at 12 per cent. per annum with annual rests from the said date. The contract rate of interest at 12 per cent. will run up to the date of payment if payment is made before the date fixed in our decree for redemption by the first defendant, viz., the 1st of June 1906 and otherwise up to that date. Subsequent to that date the principal amounts mentioned above will carry interest at 6 per cent. till date of actual payment. The question of what rate of interest should be allowed after the date fixed for redemption by the decree has been argued at length before us and the cases on the point including the Privy Council decisions in *Rameswar Koer v. Mahomed Mehdi Hussein Khan*(1) and *Maharaja of Bhartpur v. Rani Kanno Dei*(2) have been brought to our notice. We are satisfied that there is no authority making it compulsory on the Court to allow the contract rate after that date. The principle applicable is, in our opinion, correctly stated by Mr. Justice Shephard in *Commercial Bank of India v. Ateendralayya*(3). The judgment in *Krishnaswami Ayyangar v. Srinivasa Ayyangar*(4) is not consistent with that principle and Mr. Justice Subrahmania Ayyar, a member of this Bench, who took part in it does not adhere to the opinion therein expressed and considers that the earlier decision of this Bench in *Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar*(5) founded on previous decisions should be followed. In the event of non-payment by the first defendant on the date fixed for payment, the first mortgagee, the second defendant, consents to the sale of the property free from his mortgage. Therefore the decree will be, that in default of payment of the sums due the properties mortgaged to the second defendant will be sold and the

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(1) I.L.R., 26 Cal., 39.

(2) I.L.R., 23 All., 181.

(3) I.L.R., 23 Mad., 637.

(4) 11 M.L.J., 7.

(5) I.L.R., 21 Mad., 364.

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sale-proceeds applied in accordance with section 97 of the Transfer of Property Act. The second defendant will be at liberty to apply for sale under this decree. If the plaintiff's claim is not satisfied out of the surplus proceeds of the sale as aforesaid he may proceed to sell the other properties mortgaged to him only.

The main contest in this case has been with reference to certain large items in respect of which the plaintiff and the second defendant have lost. Having regard to the fraudulent nature of the claims set up by them we think the proper order to make in regard to costs is to order the three contesting parties to bear their own costs throughout.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.

1905.
September 4.

BALASUNDRA MUDELLY (DEFENDANT), APPELLANT,

v.

RAJALINGAM CHETTIAR (PLAINTIFF), RESPONDENT.*

Court Fees Act VII of 1870—Ad valorem fee chargeable on appeals against decrees under section 330 of the Code of Civil Procedure.

Where a claim under section 330 of the Code of Civil Procedure has been registered as a suit, an appeal against the decree directing delivery of property in such suit ought to be stamped with an *ad valorem* fee.

The plaintiff obtained a decree for possession of the plaint house against the father of the defendant. In executing the decree, the plaintiff was obstructed by the defendant, whose claim was registered as a suit under section 330 of the Code of Civil Procedure. The lower Court passed a decree in favour of the plaintiff.

Defendant preferred this appeal.

T. V. Muthukrishna Ayyar for T. V. Seshagiri Ayyar for appellant.

C. V. Anantakrishna Ayyar for P. R. Sundara Ayyar for respondent.

* Appeal No. 161 of 1903, presented against the decree of S. Gopalachariar Esq., District Judge of Salem, in Original Suit No. 16 of 1902.

JUDGMENT.—A preliminary objection is taken that the stamp duty paid is insufficient. There can be no doubt that the stamp duty payable with reference to the order appealed against which directs the appellant to surrender possession to the respondent, is an *ad valorem* fee. *Mahbub v. Umrao Begum*(1) and *Narayan Raghunath v. Bhagvant Anant*(2). The case of *Srinivasa Ayyangar v. Peria Tambi Nayakar*(3) is not inconsistent with this view. Apparently the order then in question was treated as one in execution and the appeal was therefore held to be properly stamped as a miscellaneous appeal.

Now as to the sufficiency of the stamp duty paid on this appeal, viz., Rs. 10, there is nothing to show that the house in dispute is of a value which will not be covered by that amount. We have consequently heard the appeal on the merits and in our opinion it fails. The findings in the previous suits establish that the debt for which the sale took place was one which bound the appellant as the vendor's son. The respondent is therefore entitled to possession of the appellant's share also. The appeal is dismissed with costs.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Boddam.

CHOWAKARAN MAKKI AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

VAYYAPRATH KUNHI KUTTI ALI AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Land Acquisition Act I of 1894—Parties bound by decision as to right to claim compensation in proceedings under—Res judicata.

An adjudication as to the right of persons claiming compensation under the Land Acquisition Act I of 1894 concludes the question between the same parties in subsequent proceedings.

Mahadevi v. Neelamani, (I.L.R., 20 Mad., 269), distinguished.

(1) I.L.R., 8 Calc., 720.

(2) I.L.R., 10 Bom., 238.

(3) I.L.R., 4 Mad., 420.

* Appeal No. 88 of 1903, presented against the decree of M.R. By. M. Achutan Nair, Subordinate Judge of North Malabar, in Original Suit No. 11 of 1902.

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MUDELLY
v.
RAJALINGAM
CHETTIAR.

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KUNHI KUTTI
ALI.

SUIT to set aside a decision passed by the District Court on a reference by the Collector under section 11 of Act I of 1894, and to have it declared that the plaintiffs and the third defendant were entitled to the compensation money, which on such reference was decided to belong to the tarward of defendants Nos. 1 and 2. The plaintiffs and the defendants were parties to the reference.

The Subordinate Judge dismissed the suit as *res judicata* on the ground that the decision in the reference was binding on the parties.

Plaintiffs preferred this appeal.

Mr. C. Krishnan for appellants.

J. L. Rosario for second respondent.

JUDGMENT.—The question here is with reference to the compensation which formed the subject of decision in a previous proceeding under the Land Acquisition Act held on a reference made by the Collector owing to disputes between the persons entitled to receive it. It was then held that the compensation was payable to the tarward represented by the respondents. That decision is as held by the District Judge binding on the parties here as they were all parties thereto. That an adjudication as to the right of persons claiming the compensation in accordance with the provisions of the Land Acquisition Act (X of 1870) concluded the question between the same parties was decided by the judicial committee. There is nothing in the provisions of the present Land Acquisition Act (I of 1894) to warrant its being held differently in regard to similar adjudications made under the Act. The case (*Mahadevi v. Neelamani*(1)) is perfectly consistent with this view inasmuch as the question there was not with reference to the compensation which had been the subject of decision in proceedings under the Land Acquisition Act, but in respect of other property though the title thereto was the same as the title to the compensation.

We dismiss the appeal with costs.

(1) I.L.R., 20 Mad., 269.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

CHETTIATTIL MUHAMOD (PLAINTIFF), APPELLANT IN SECOND
APPEAL No. 376 OF 1903,
PUNNOLI MADHAVIAMMA AND ANOTHER (PLAINTIFFS),
APPELLANTS IN SECOND APPEAL No. 592 OF 1903,

1905.
September 6.

v.

KUNHI KORU AND OTHERS (DEFENDANTS), RESPONDENTS IN
SECOND APPEAL No. 376 OF 1903,
AMBALI KUNHI KORU AND OTHERS (DEFENDANTS), RESPONDENTS
IN SECOND APPEAL No. 592 OF 1903.*

Attachment—Existence of decree at time of attachment necessary to make it valid.

An attachment in execution, whether made by the Court which passed the decree or by the Court to which such decree had been transferred for execution, is null and void, if at the time of attachment the decree had been set aside and was non-existent; and a renewed decree, in the same terms as the original decree, passed subsequently will not validate it.

THE fifth defendant in these suits obtained a money decree *ex-parte* against the defendants Nos. 1 to 4 in the Zilla Court of Anjilaymal, which was transferred for execution to the Sub-Court of Calicut. This *ex-parte* decree was set aside on the 3rd February 1900, but the Subordinate Judge in ignorance of this fact issued an order of attachment of the plaintiff properties on the 19th February 1900 and the attachment was actually made on the 10th March 1900. The Zilla Court subsequently passed a decree in the same terms as the first decree on the 8th February 1901. In April and May 1901 certain dispositions of the plaintiff properties were made in favour of the plaintiffs by the defendants Nos. 1 to 4. The fifth defendant then attempted to bring the properties to sale on the strength of the original attachment, when the plaintiffs put in a claim petition based upon the dispositions by defendants Nos. 1 to 4 in their favour. The Subordinate Judge dismissed their claims holding that the attachment was subsisting at the date of

* Second Appeal No. 376 of 1903, presented against the decree of N. S. Brodie, Esq., District Judge of South Malabar, in Appeal Suit No. 499 of 1903, presented against the decree of M.B. By. T. V. Narayanan Nair, District Munsif of Parapanangadi, in Original Suit No. 565 of 1901—*vide* Second Appeal No. 592 of 1903.

CHETTIATTIL MUHAMOD v. KUNHI KORU. the alienation to them. The plaintiffs instituted these suits for a declaration that the alienation in their favour was valid.

The substantial question involved was whether the attachment was subsisting at the time the defendants Nos. 1 to 4 made the alienation in favour of the plaintiffs.

Both the lower Courts decided against the plaintiffs.

Plaintiffs preferred these second appeals.

J. L. Rosario for appellant.

T. R. Ramachandra Ayyar for fifth respondent.

JUDGMENT.—The *ex-parte* decree was set aside on the 3rd February 1900. Notwithstanding this, an order for attachment of property in execution of that decree was made on the 19th February 1900, and the attachment was actually made on the 10th March 1900. On the 8th February 1901 a revised decree was passed.

When the attachment was made, and even when the order for attachment was made, there was no decree in existence and we are entirely unable to see how any order or attachment so made could have any force or validity. We cannot agree with the District Judge that the fact that the decree had been transferred for execution to another Court could give the attachment any additional validity. The attachment not being based on any decree in existence at the time was null and void, and the fact that a decree was subsequently passed in terms of the decree that was set aside had not the effect of restoring the original decree nor could it operate to render the attachment valid. We set aside the decrees of the Courts below and remand the suits to the Court of First Instance for trial of the fourth issue in Second Appeal No. 376, and the second issue in Second Appeal No. 592, and for disposal in accordance with law. Costs in this and in the lower Appellate Court will abide the result.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

KAMESWARAMMA (SECOND DEFENDANT), APPELLANT IN
SECOND APPEAL NO. 3058 OF 1903, AND (PLAINTIFF), APPELLANT
IN SECOND APPEAL NO. 3059 OF 1903,

1905.
September
14.

v.

SITARAMANUJA CHARLU AND ANOTHER (PLAINTIFFS AND FIRST
DEFENDANT), RESPONDENTS IN SECOND APPEAL NO. 3058 OF 1903,
AND (SECOND AND FIRST DEFENDANTS), RESPONDENTS IN SECOND
APPEAL NO. 3059 OF 1903.*

Transfer of Property Act IV of 1882, s. 40—Trust Act II of 1882, s. 91—Mortgages with knowledge of facts which might have revealed the existence of an equitable right, bound by such right.

Where a mortgagee, at the time of his mortgage, is aware of circumstances which ought to have put him on enquiry, and such enquiry if made, would have revealed the existence of an agreement by the mortgagor to mortgage the property to a third party, the mortgagee's rights, will on the principles embodied in section 40 of the Transfer of Property Act and section 91 of the Trusts Act, be postponed to the rights of such third party.

ORIGINAL SUIT No. 410 of 1901 in the Court of the District Munsif of Masulipatam was instituted by the plaintiff to recover the amount due on a mortgage bond executed by the first defendant's cousin. The second defendant held a prior mortgage on the same properties and the plaintiff claimed priority over the second defendant on the ground that there was, at the time of the mortgage in favour of the second defendant, an agreement to mortgage the property to the plaintiff and that the second defendant was aware of such agreement. The mortgage deed of the second defendant recited that the title-deeds of the property were with the plaintiff as security for a debt.

The second defendant instituted Original Suit No. 31 of 1902 in the same Court on his mortgage, making the plaintiff in Original Suit No. 410 of 1902, second defendant.

* Second Appeals Nos. 3058 and 3059 of 1903, presented against the decrees of V. Venugopal Chetty, Esq., District Judge of Kistna at Masulipatam, in Appeal Suits Nos. 641 and 642 of 1902, presented against the decrees of M.R. S. Ramaswami Ayyar, District Munsif of Masulipatam, in Original Suits Nos. 31 of 1902 and 410 of 1901.

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v.
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NUJA
CHARLU.

The substantial question in both cases was whether the plaintiff in Original Suit No. 410 of 1901 had priority over the second defendant.

The District Munsif held that he had priority but the District Judge on appeal held that he had not.

Plaintiff in Original Suit No. 410 of 1901 preferred these second appeals.

K. S. Ramaswami Sastri for *K. Subrahmania Sastri* for appellant.

Dr. S. Swaminadhan and *T. Ramachandra Rau* for first respondent.

JUDGMENT.—We are clear that the information given to Sitharamanuja Chari that the title-deeds were deposited with Kameswaramma "as security towards the debt of the note for Rs. 350 executed and given on the 11th September 1897 in favour of Kameswaramma" was sufficient to put him on enquiry as to why the deeds were not with the mortgagor and he must be held to have had constructive notice of the agreement to give Kameswaramma a mortgage of the lands. In accordance with the principles embodied in section 40 of the Transfer of Property Act and section 91 of the Indian Trusts Act Sitharamanuja's mortgage interest must be postponed to that of Kameswaramma.

We set aside the decrees of the Courts below in Original Suit No. 410 of 1901 and direct that Kameswaramma have the usual mortgage decree with costs throughout, and in Original Suit No. 31 of 1902 that the decree in favour of Sitharamanuja be subject to the mortgage amount due to Kameswaramma as found in Original Suit No. 410 of 1901. Kameswaramma must have her costs throughout in this suit also from Sitharamanuja Chari.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Moore.

VENKATAPPA NAICK (TENTH PLAINTIFF), APPELLANT,

v.

SUBBA NAICK (DEFENDANT), RESPONDENT.*

Fraud—Judgment obtained by perjury may be set aside on the ground of fraud.

A suit will lie to set aside a judgment on the ground that it was obtained by fraud committed by the defendant, upon the Court by committing deliberate perjury and by suppressing evidence.

The law on this point is the same in India as in England.

SUIT to set aside a decree obtained by the defendant against the plaintiff on the ground that the defendant obtained the same by giving false evidence and suppressing a material document, and to recover the amount realised by the defendant under such decree, with interest and damages.

Both the lower Courts in dismissing the suit held that the fraud alleged was not of a nature for which a suit like the present lay.

The tenth plaintiff preferred this second appeal.

V. Krishnaswami Ayyar and *S. Srinivasa Ayyar* for appellant.
C. Ramachandra Rau Sahib for respondent.

JUDGMENT.—This case has apparently been disposed of upon the preliminary issues as to whether the plaintiff has any cause of action and whether the Court has jurisdiction to entertain the suit without giving the plaintiff any opportunity to put in his evidence.

The suit is to set aside a judgment on the ground that it was obtained by fraud and the fraud alleged is perjury by the defendant and the suppression of evidence. The law as to the right to bring such an action is the same in this country as in England and in England the law is authoritatively and finally laid down in *Abouloff v. Oppenheimer*(1) and *Vadala v. Lawes*(2) where the observations on the law by James, L.J., in *Flower v.*

* Second Appeal No. 927 of 1903, presented against the decree of W. W. Philpotts, Esq., District Judge of Tinnevely, in Appeal Suit No. 302 of 1902, presented against the decree of M.R. Ry. T. Krishnaswami Naidu, District Munsif of Satur, in Original Suit No. 208 of 1902.

(1) L.R., 10 Q.B.D., 295.

(2) L.R., 25 Q.B.D., 310.

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19.

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NAICK.

Lloyd(1) are dealt with and disposed of. Lindley, L.J., in his judgment in *Vadala v. Laues*(2) says that the rule is perfectly well known and established, that a party to an action can impeach the judgment in it for fraud whether the judgment is that of an English Court or of a foreign Court, and that not only, where there has been a fraud on the Court by what is called extrinsic circumstances, but also where the plaintiff has obtained judgment by the use of perjured evidence that is such fraud as would enable the defendant to impeach the judgment; and at page 319 quoting the judgment of Brett, L.J., in *Abouloff v. Oppenheimer*(3) he says "I will assume even that the defendants gave the very same evidence that they propose to adduce in this action; nevertheless, the defendants will not be debarred at the trial of this action from making the same charge of fraud, and from adducing the same evidence in support of it; and if the High Court of Justice is satisfied that the allegations of the defendants are true, and that the fraud was committed, the defendants will be entitled to succeed in the present action." It follows from the above that there is nothing to preclude the Court from entertaining the plaintiff's action; and if the plaintiff succeeds, when he has an opportunity of producing his evidence, in satisfying the Court that the judgment he seeks to set aside was obtained by a fraud committed by the defendant upon the Court by committing deliberate perjury and suppressing evidence, the plaintiff will be entitled to succeed. We therefore set aside the decrees of the Courts below and remand the suit to the District Munsif's Court for disposal according to law.

The costs in this and the lower Appellate Court will abide and follow the result.

(1) L.R., 10 Ch.D., 327.

(2) L.R. 25 Q.B.D., 310.

(3) L.R., 10 Q.B.D., 295.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

THE COLLECTOR OF CHINGLEPUT FOR THE SECRETARY
OF STATE FOR INDIA (DEFENDANT, JUDGMENT-DEBTOR),
APPELLANT,

1905.
September
11, 12.

SUBRAYA MUDALIAR (PLAINTIFF, DECREE-HOLDER),
RESPONDENT.*

Madras Salt Act IV of 1889, ss. 16 (a), 18 and 27—No compensation under section 18 when license cancelled under section 27—Civil Procedure Code, Act XIV of 1882, s. 244.

Where a license has been cancelled under section 27 of the Madras Salt Act IV of 1889, the licensee is not entitled to compensation under section 18 of the Act, but only to the value of the proprietary right under section 16 (a) of the Act.

Where such licensee has obtained a decree for possession of salt pans in default of payment of proper compensation, it is competent to the Court in execution proceedings to determine the amount so payable; and no separate suit need be brought to determine such amount.

THE respondent instituted a suit against the appellant (the Secretary of State) for cancelling an order resuming certain salt pans and for possession of the pans. A decree was passed by the Munsif directing that the plaintiff should recover possession of the salt pans if the defendant failed to pay proper compensation under section 16 (a) of the Madras Salt Act. The defendant tendered Rs. 2 as the value of the proprietary right under section 16 (a), and the plaintiff having refused to accept the amount tendered applied for execution of his decree by being put in possession of the salt pans. The Munsif dismissed the application on the ground that the plaintiff's remedy was to have the proper amount ascertained by a separate suit.

In appeal the District Judge reversed the order on the ground that the plaintiff was entitled to compensation under section 18 of

* Civil Miscellaneous Second Appeal No. 9 of 1905, presented against the order of R. D. Broadfoot, Esq., District Judge of Chingleput, in Appeal Suit No. 215 of 1904 (Execution Petition No. 38 of 1904, in Original Suit No. 473 of 1899 on the file of the District Munsif's Court of Chingleput).

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Madras Salt Act, and directed the Munsif to ascertain such amount.

The defendant preferred this appeal.

The Government Pleader (Mr. E. B. Powell) for appellant.

S. Venkatachariar for C. Venkatasubbaramiah for respondent.

JUDGMENT.—The District Judge is in error in saying that the plaintiff is entitled to compensation under section 18 of Madras Act IV of 1889. That section has no application to a case like the present in which the license has been cancelled under section 27 of the Act. In such case, the licensee is only entitled under section 16 (a) to the value of the proprietary right in the land, and in calculating such value, the value of the land as a site for salt manufacture is not to be taken into account. The Commissioner is to value the proprietary right at his discretion, and, if the valuation is not accepted, the licensee may resort to the Court for the determination of the amount.

In the present case the Commissioner fixed Rs. 2, as the value. The licensee does not accept it. The District Munsif is a Court of competent jurisdiction and has the matter before him in execution of the decree. He should therefore proceed to determine the proper value of the proprietary right on such evidence as may be adduced before him by either side and direct payment thereof by the defendant.

We modify the order of the District Judge accordingly. Costs in all Courts will be provided for in the fresh order of the District Munsif.

APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice,
and Mr. Justice Sankaran Nair.

SOMASUNDARAM PILLAI (DEFENDANT), APPELLANT,

v.

KRISHNASAMY NAIDU AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

1905.
August 17.

Civil Procedure Code—Act XIV of 1882—One of two joint decree-holders recovering the whole amount liable to the other for his share.

Although a payment to one of two joint decree-holders of the whole decree amount does not, even when certified, absolve the judgment-debtor from liability to the other decree-holder, such decree-holder is not bound to proceed against the judgment-debtor in execution, but may sue to recover his share from the other decree-holder.

THE facts necessary for this report are set out in the judgment.

R. Kuppuswami Ayyar for appellant.

K. Ramachandra Ayyar for the Hon. Mr. P. S. Sivaswami Ayyar for respondents.

JUDGMENT.—We agree with the learned Judge that the plaintiffs' allegations entitle them to sue. The costs awarded by the decree were according to it payable to both the plaintiffs and the defendant.

The defendant received the whole amount from the judgment-debtor and certified to the Court the fact of such receipt. The circumstance that such certificate was not of itself binding upon the plaintiffs does not preclude them from recovering from the defendant so much of the amount as they are entitled to, if they elect to adopt such a course instead of proceeding against the judgment-debtor in execution.

This appeal is dismissed with costs.

* Appeal No. 1 of 1905 under section 15 of the Letters Patent, presented against the judgment of Mr. Justice Boddam, in Civil Revision Petition No. 283 of 1904, preferred from Small Cause Suit No. 1280 of 1906 on the file of the Subordinate Judge's Court of Tanjore.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr Justice Boddam.

1905. SRINIVASA RAGHAVA AYYANGAR (PETITIONER), APPELLANT,
September 8.

v.

PICHAIKARAN AND OTHERS, RESPONDENTS.*

Provincial Small Cause Courts Act IX of 1887, sched. II, art. 31—Suit for rent.

A suit by a divided coparcener to recover his share of rent from a tenant, and, if he should not be liable, from the other coparcener in whose sole name the lease was executed by the tenant, is substantially a suit for rent and is not as against the coparcener 'a suit for the profits of immoveable property belonging to plaintiff, which have been wrongfully received by defendant' within the meaning of article 31 of the second schedule of the Provincial Small Cause Courts Act.

THE facts necessary for this report are set out in the order of reference which runs as follows :—

"The plaint in Small Cause No. 1979 of 1903 was presented to the Subordinate Judge, Kumbakonam, on the 26th October 1903, and was returned by him, on the ground that he had no jurisdiction, for presentation to the proper Court. No further reasons were given. It was then presented to the District Munsif, Kumbakonam, who on 31st August 1904 returned it for presentation to the proper Court, because it was of a small cause nature. Petitioner has filed an Appeal No. 47 of 1904 against this order, and Original Petition No. 1131 of 1904, asking that, in case the District Munsif's order be reversed, the question whether the Subordinate Judge's order was correct be referred to the High Court under section 646 (b), Civil Procedure Code. I therefore submit the question accordingly."

"First defendant was a tenant of the joint family composed of second defendant and plaintiffs. At division, a registered deed of partition was executed by plaintiffs and second defendant, providing that a certain proportion of the lands should fall to the share of the former. They now sue for the rent due on that proportion. Second defendant is joined, as a party, because, the

* Referred Case No. 1 of 1905, stated under section 646-B, Act XIV of 1882, by F. D. P. Oldfield, Esq., District Judge of Tanjore, in Civil Miscellaneous Appeal No. 47 of 1904 (Original Petition No. 1131 of 1904).

lease deed standing solely in second defendant's name, he is alleged to be bound to pay them their share of the rent in case first defendant is not found liable."

SRINIVASA
RAGHAVA
AYYANGAR
v.
PICHAIKARAN.

As against first defendant the suit is for rent, and is clearly cognisable by a Small Cause Court. As regards second defendant the only question is whether the suit comes under article 31, schedule II, Small Cause Courts Act, and is "a suit for the profits of immoveable property belonging to the plaintiff, which have been wrongfully received by the defendant." With these remarks, the matter will be submitted for the decision of the High Court. The petitioner has been ordered to deposit process fees within seven days from 13th December. As the matter is referred to the High Court, it is unnecessary for me to decide the appeal, which is dismissed. No order as to costs.

The parties were not represented.

JUDGMENT.—We are of opinion that the suit is substantially one for rent and does not fall within article 31 of the second schedule, Provincial Small Cause Courts Act, and the Small Cause Court has jurisdiction.

The Subordinate Judge of Kumbakonam will therefore receive the plaint on his file and dispose of it according to law.

APPELLATE CRIMINAL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice.

ABU BAKER (ACCUSED), PETITIONER,

v.

THE MUNICIPALITY OF NEGAPATAM, RESPONDENT.*

District Municipalities Act (Madras) IV of 1884, ss. 197, 191—Market, definition of—Use of, as market, what amounts to.

Private property is used as a market when it is used as a public place for buying and selling.

* Criminal Revision Case No. 151 of 1905, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of C. T. H. Johnson, Esq., First-class Sub-Divisional Magistrate of Negapatam, in Criminal Appeal No. 78 of 1904, confirming the decision of the Court of the Bench of Magistrates of Negapatam in Summary Trial No. 1101 of 1904—vide Criminal Revision Case Nos. 152, 153, 154 and 155 of 1905.

1905.
October 9,
16.

ABU BAKER
v.
THE MUNICIPALITY OF
NEGAPATAM.

Where a private market had been ordered to be closed, a person using the place for selling fish and flesh after a license had been refused is guilty of an offence under section 197 of the Madras District Municipalities Act, or at any rate, of an offence under section 191.

THE petitioner in this case was charged with having sold mutton without having obtaining a license before the Bench of Magistrates at Negapatam. The place where the accused sold the mutton was originally a market which was closed by order in 1888. The accused applied for a license which was refused.

The accused was convicted under sections 191, 197 and 264 of the Madras District Municipalities Act and the conviction was affirmed on appeal.

The accused preferred this criminal revision petition.

V. Ryrn Nambiar for petitioner.

The respondent was not represented.

ORDER.—The convictions in these cases are clearly sustainable. The place where the fish or mutton was sold was originally a recognized market. It was closed under orders in 1888. No license having since been granted for the use of the place as a market, the sales conducted by the accused, in respect of which the charges are made, are punishable under section 197 of the District Municipalities Act, if the use of the place which is private property was as a market, *i.e.*, as a public place for buying and selling, such being the meaning of the term "market" in law (*see* Bouvier's 'Law Dictionary,' volume II, p. 316). Even if it were otherwise, the accused were guilty of an offence under section 191, clause (2), of the Act as they *without license* sold "flesh" or fish "intended for food." The petitions are dismissed.

APPELLATE CRIMINAL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice.

EMPEROR

v.

PALANIAPPAVELAN AND ANOTHER.*

1905.
October 10.

Accused person—Notice to accused person necessary before order in his favour can be set aside.

An order by a Magistrate directing payment of compensation to the accused ought not to be set aside on appeal without notice to the accused. It will also be safer to give notice to the officer appointed by the Local Government referred to in section 422 of the Code of Criminal Procedure.

THE facts necessary for this report are set out in the judgment.

The Public Prosecutor (Mr. E. B. Powell) opposed the Reference.

ORDER.—In this case the order awarding compensation to the accused was reversed on the appeal preferred by the complainant, but without notice either to the accused or to the Public Prosecutor. There is no express provision directing that notice should be given to the former in such a case. But on the principle *audi alteram partem* the accused should have notice of the appeal in order that they may have an opportunity of supporting the order passed in their favour.

As regards the view suggested by the Sessions Judge it would seem that, according to the letter of the law, notice to the officer, if any, appointed by the local Government referred to in section 422 of the Criminal Procedure Code is necessary even in such cases where the appeal is not summarily rejected though there seems little reason for notice to that officer in a matter in which the accused only are really interested. Though the point is somewhat doubtful it seems to me that the safer course in cases like this is to give notice to both the accused and the officer referred to when the appeal is not summarily rejected. The order of the Appellate Court is set aside and the Criminal Appeal No. 75 of 1905 will be replaced on the file of Sub-divisional First-class Magistrate, Dindigul, and disposed of according to law after notice to the accused and the Public Prosecutor.

* Criminal Reference No. 49 of 1905 (Criminal Revision Case No. 264 of 1905) made under section 438 of the Code of Criminal Procedure by J. Hewetson, Esq., Sessions Judge of Madras, in his letter, dated 19th July 1905, No. 4818,

APPELLATE CRIMINAL.

Before Mr. Justice Boddam and Mr. Justice Moore.

1905.
October 17.

EMPEROR

v.

KARUPPANA PILLAI and ANOTHER.*

Criminal Procedure Code, Act V of 1898, s. 423—Order under directing payment of costs not an enhancement of sentence—Court Fees Act VII of 1870.

An order under section 31 of the Court Fees Act directing the accused, on appeal against conviction, to pay the costs of the complainant is not an enhancement of the sentence.

Madan Mandal v. Haran Ghose, (I.L.R., 20 Calc., 687), approved.

Queen-Empress v. Tangavelu Chetty, (I.L.R., 22 Mad., 153), dissented from.

THE facts necessary for this report are set out in the letter of reference which is as follows :—

“ Under section 438, Criminal Procedure Code, I have the honour to report the result of my examination of the records in Criminal Appeal No. 119 of 1905 on the file of the First-class Sub-Divisional Magistrate, Ramnad Division.

“ In Calendar Case No. 132 of 1905, the Sub-Magistrate of Pamban convicted two persons under section 352, Indian Penal Code, and sentenced the first accused to pay a fine of Rs. 5, in default to undergo a week's simple imprisonment, and the second accused to pay a fine of Rs. 2, in default to undergo three days' simple imprisonment and found that, under the circumstances of the case, the complainant was not entitled to either cost or compensation. The Sub-Divisional Magistrate while confirming the Sub-Magistrate's order in appeal, also directed that the accused should pay Rs. 1-8-0 to the complainant, and this order the Sub-Divisional Magistrate has passed under section 31 of the Court Fees Act. Under that section the convicting Court has to make such an order; and the Sub-Magistrate in this case having found that the complainant was not entitled to any cost or compensation, the Sub-Divisional Magistrate's order in appeal directing the

* Criminal Reference No. 74 of 1905 (Criminal Revision Case No. 335 of 1905) made under section 438 of the Code of Criminal Procedure by J. Hewatson, Esq., Sessions Judge of Madura, in his letter, dated 28th August 1905, No. 5861.

accused to pay costs to complainant is illegal as it amounts to an enhancement of the sentence. I submit that the order of the Sub-Divisional Magistrate be set aside.”

The Public Prosecutor (Mr. E. B. Powell) in support of the Reference.

ORDER.—We think that the Sub-Divisional Magistrate's order in appeal directing the accused to pay the costs of the complainant is not illegal as it does not amount to an enhancement of sentence. The order is made under section 31 of the Court Fees Act, and is entirely irrespective of the penalty or sentence passed under the Indian Penal Code or the Criminal Procedure Code. It has been held in *Madan Mandal v. Haran Ghose*(1) that it forms no part of the sentence, and the Court Fees Act itself says that “ the Court shall in addition to the penalty imposed ” order it to be paid. It is not therefore any part of the sentence, and the order of the Sub-Divisional Magistrate in appeal correcting the omission of the Court below to order it to be paid does not amount to an enhancement of the sentence.

We disagree with the decision in *Queen-Empress v. Tangavelu Chetty*(2).

(1) I.L.R., 20 Calc., 687.

(2) I.L.R., 22 Mad., 153.

EMPEROR
v.
KARUPPANA
PILLAI.

APPELLATE CRIMINAL.

Before Mr. Justice Boddam and Mr. Justice Moore.

MUTHIAH CHEITI AND OTHERS (ACCUSED-APPELLANTS),
PETITIONERS,

v.

EMPEROR, RESPONDENT.*

1905.
October 16,
17.

Criminal Procedure Code—Act V of 1898, s. 106—Appellate Court cannot bind over to keep peace when Lower Court not one of the class referred to in the section, and no breach of the peace committed.

An accused person cannot be bound over to keep the peace under section 106 of the Code of Criminal Procedure unless he is convicted of an offence of which a breach of the peace is a necessary ingredient and unless it is found that a breach of the peace has actually occurred.

An Appellate Court cannot exercise the power under the section when the accused has not been convicted by a Court such as is referred to in the section.

THE petitioners in this case were charged with several others, in all numbering 100, with having demolished the roof of a shed belonging to P. W. 13. They were tried before the Second-class Magistrate of Tiruppattur, and their defence was that the land was the property of the first accused and that they had a right to demolish the shed. The Sub-Magistrate convicted the accused of offences under sections 147 and 426 of the Indian Penal Code and passed sentences of fines on them. He found that no force or violence had been used to any person.

On appeal by the petitioners, the conviction under section 426 was set aside and the conviction under section 147 was altered to one under section 143. The sentences were confirmed, and in addition, the first accused was bound over under section 106 of the Code of Criminal Procedure to keep the peace for one year in two sureties of Rs. 500 each, and the rest in two sureties of Rs. 50 each.

* Criminal Revision Case No. 146 of 1905, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of A. Thompson, Esq., Sub-Divisional Magistrate of Ramnad Division, in Criminal Appeal No. 28 of 1905 (Calendar Case No. 728 of 1904 on the file of the Second-class Magistrate of Tiruppattur).

The accused preferred this criminal revision petition.

Sir V. Bhashyam Ayyangar for first and second petitioners.

Mr. M. A. Thirunarayana Chariar, V. Krishnaswami Ayyar and S. Srinivasa Ayyangar for petitioners Nos. 3 to 6.

The Public Prosecutor (Mr. Powell) in support of the conviction.

JUDGMENT.—The appellants have been convicted of being members of an unlawful assembly and have been fined under section 143, Indian Penal Code. They have also been bound over to keep the peace under section 106, Criminal Procedure Code.

We are clearly of opinion that the conviction was right. It is found that the appellants with others to the number of 100 armed with aruvals, sticks, etc., went to a piece of land claimed by the prosecutor with the object of taking possession of it and demolishing a building upon it and though no force or violence was used—that was because the prosecution party were overawed and did not come into conflict with them.

It is however contended, and we think rightly, that the accused in the circumstances of this case were improperly bound over to keep the peace under section 106, Criminal Procedure Code, inasmuch as (1) they were convicted by a Second-class Magistrate only and not before a Court such as is named in the section and (2) they have not been convicted of an offence involving a breach of the peace.

We think that the power given to an Appellate Court to make an order under this section is not an unlimited power to make such an order in any circumstances, but is to be taken as giving the Appellate Court power to do only that which the lower Court could and should have done, and therefore, that the power of the Court to pass such an order is confined to cases where the conviction has been by a Court named in the section and in circumstances required by the section.

It has been held that the words "involving a breach of the peace" in the section, require that a breach of the peace should be an ingredient of the offence proved, and that before the section can be put in force there must be a finding that a breach of the peace has occurred (see *Baidya Nath Majumdar v. Nibaran Chunder Gope*(1) and *Kannookaran Kunhamad and others v.*

MUTHIAH
CHEITI
v.
EMPEROR.

(1) I.L.R., 30 Calc., 93.

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v.
EMPEROR.

Emperor(1)). As in this case there was no finding that a breach of the peace had been committed, and the offence for which the accused were convicted did not necessarily involve a breach of the peace and no breach of the peace was in fact committed, we set aside the order requiring the accused to give security for keeping the peace, and the bonds if already executed will be cancelled.

Except as above, we affirm the convictions and sentences.

APPELLATE CRIMINAL.

Before Mr. Justice Boddam and Mr. Justice Moore.

EMPEROR

v.

RAMASAWMY RAJU.*

Madras District Police Act XXIV of 1859, s. 44.—Police constable not returning to duty after expiry of leave guilty of offence under.

A police constable, who, having obtained casual leave, does not return to duty on the expiry of such leave and stays away without obtaining fresh leave, is guilty under section 44 of Act XXIV of 1859 of the offence of 'ceasing to perform the duties of his office without leave.'

THE facts necessary for this report are set out in the judgment.

The Public Prosecutor (Mr. Powell) for appellant.

JUDGMENT.—We think the order of acquittal in this case must be set aside.

The accused, a police constable, was charged under section 44 of Act XXIV of 1859 with "ceasing to perform the duties of his office without leave." It appears that he applied for leave which was refused. He then obtained three days' casual leave, and whilst on such leave again applied for long leave which was again refused. He did not however return to duty at the expiry of his casual leave but stayed away without leave. Having stayed away from duty for over one month sanction was granted for his

(1) I.L.R., 23 Mad., 469.

* Criminal Appeal No. 298 of 1905, presented under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused in Criminal Appeal No. 101 of 1904 by M.R.Ry. C. S. Anantarama Ayyar, Sub-Divisional Magistrate of Melur Division (Calendar Case No. 998 of 1904 on the file of the Stationary Third-class Sub-Magistrate, Madura Town).

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prosecution under the above section, and the Stationary Sub-Magistrate of Madura Town tried, convicted, and sentenced him to a fine of Rs. 12 or in default one week's simple imprisonment. On appeal the Sub-Divisional First-class Magistrate set aside the conviction and acquitted him, holding that the facts proved did not constitute the offence of "ceasing to perform the duties of his office without leave" inasmuch as he was on casual leave and merely overstayed his leave.

We think that is wrong. We are of opinion that, if a police constable is granted casual leave for a limited period and does not at the end of that period resume his duties as a police constable, he withdraws himself from his duties and "ceases to perform the duties of his office without leave" within the meaning of the section.

The intention of the section is to render police constables liable to punishment for such neglect or breaches of duty as are not punishable under section 10 of the Act, such as desertion: *Primâ facie*, a constable absent without leave is guilty of "ceasing to perform his duty." The fact that he has been permitted to be absent on casual leave for a time immediately anterior to his absenting himself from duty can make no difference in his offence. At the expiry of his casual leave he should, presumably, be on duty, and his own omission to return to duty cannot make his conduct less an offence than if he had returned to duty and then ceased to perform his duty.

We therefore set aside the acquittal of the First-class Sub-Divisional Magistrate, and restore and confirm the conviction and sentence of the Stationary Subordinate Magistrate.

PRIVY COUNCIL.

P.C.*
1906.
February 15.

VENGANAT SWAROOPATHIL VALIA NAMBIDI AVERGAL

v.

CHERAKUNNATH NAMBIYATHAN NAMBUDRIS
KRISHNAN NAMBUDRIPAD AND ANOTHER
ex parte VENGANAT SWAROOPATHIL VALIA NAMBIDI
AVERGAL.

[On appeal from the High Court of Judicature
at Madras.]

*Appeal to Privy Council—Practice—Application to High Court for certificate for
leave to appeal to Privy Council—Grounds for refusal of leave.*

It is desirable that the High Court, in refusing a certificate for leave to
appeal to His Majesty in Council, should state their reasons for refusing it.

PETITION for special leave to appeal from two decrees (15th
February 1905) of the High Court of Judicature at Madras.

The subject-matter of the petition related to a dispute as to the
right to superintend and manage an ancient temple or pagoda
in Palghat, of which the respondents were uralers or trustees, and
over which the petitioner claimed what are known as melkoima
rights. Disputes as to the respective rights of the parties or their
predecessors in title had been compromised in 1845 and 1874
on which occasions the melkoima rights had been recognized; and
in 1887 disputes having again arisen, a suit was brought by
the respondents against the petitioner in which they claimed
the exclusive right of management. This suit eventually came
before the Privy Council who upheld the decree of the High Court
that the parties had a joint right of management (see *Nilkandhen
Nambudirapad v. Padmanabha Revi Varma*(1)). In 1899 the
respondents brought a suit to have the exclusive rights they
claimed declared; and the petitioner also brought a suit asserting
his melkoima rights and asking for a declaration of their extent;
and in those suits, on appeal, the High Court made the two decrees
from which the petitioner now desired leave to appeal.

The petition stated that the value of the subject-matter of the
suit in Court of First Instance and on appeal was over Rs. 10,000;
that the appeal involved substantial questions of law, particularly,

* Present: Lord DAVEY, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.
(1) L.R., 21 I.A., 128; I.L.R., 18 Mad., 1.

as to whether the petitioner was estopped by the compromises of
1845 and 1874 from setting up the melkoima rights claimed by
him, and whether the judgment of the Privy Council in the
previous suit was conclusive as to the nature and extent of the
right of superintendence and management vested respectively in
the melkoima and the uralers; and that on 8th August the
petitioner had filed two applications to the High Court for leave
to appeal to the Privy Council against the decrees of 15th Feb-
ruary 1905, but the High Court had, on 23rd September 1905,
dismissed them without giving any reasons.

DeGruyther for the petitioner.

15th February 1906.—The judgment of their Lordships was
delivered by

Lord DAVEY.—Their Lordships do not think that this is a case
in which they can advise His Majesty to grant special leave to
appeal. Their Lordships desire to add that it would be conve-
nient if the High Court, on future occasions, in refusing a
certificate for leave to appeal, would be good enough to state the
grounds on which they refused it.

Application refused.

Solicitors for the appellant: *Lawford, Waterhouse & Lawford.*

APPELLATE CIVIL—FULL BENCH.

*Before Sir Arnold White, Chief Justice, and Mr. Justice
Subrahmanya Ayyar, and Mr. Justice Davies.*

AVANASI GOUNDEN AND OTHERS (DEFENDANTS NOS. 1, 2 AND 4
AND SECOND DEFENDANT'S LEGAL REPRESENTATIVES), APPELLANTS,
v.

1905.
October
18, 19.
November 10.

NACHAMMAL (PLAINTIFF), RESPONDENT.*

*Civil Procedure Code Act XIV of 1882, s. 13—Res judicata—‘Of competent
Jurisdiction’ meaning of—Decision against which no second appeal allowed, no
bar to suit open to second appeal.*

The words ‘of jurisdiction competent’ in section 13 of the Code of Civil
Procedure admit of the provisions of law relating to appealability being

* Second Appeal No. 975 of 1903, presented against the decree of Vernor
A. Brodie, Esq., District Judge of Coimbatore, in Appeal Suit No. 88 of 1902,
presented against the decree of M.R.Ry. T. Sadasiva Ayyar, District Munsif of
Coimbatore, in Original Suit No. 1036 of 1900.

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considered in giving effect to the principle of estoppel, which ought to be so applied that, so far as possible, Courts of higher jurisdiction are not tied down by the decisions of inferior Courts. A decision in a previous suit of a small cause nature, in which no second appeal is allowed by law is no bar to a subsequent suit, in the same Court, which not being of a small cause nature is open to second appeal.

Subbammal v. Huddleston, (I.L.R., 17 Mad., 273), overruled.

Ahmed v. Moidin, (I.L.R., 24 Mad., 444), overruled.

Raja Simhadri Appa Row v. Ramachandrudu, (I.L.R., 27 Mad., 63), overruled.

Namasivayya Gurukkal v. Kadir Ammal, (I.L.R., 17 Mad., 168), followed.

Mussamut Edun v. Mussamut Bechun, (8 W.R., 175), referred to.

Misir Raghubardial v. Sheo Baksh Singh, (I.L.R., 9 Cal., 439), referred to.

SUIT by the plaintiff for possession of land and mesne profits. The defendants' plea was that the lands belonged to them and not to the plaintiff. A previous suit (Original Suit No. 973 of 1898) was instituted by the plaintiff against these defendants to recover a sum of Rs. 240 as damages caused to her by the defendants having prevented the irrigation of cholam crops grown on a portion of the plaint lands. The defendants denied the plaintiff's title to the lands. An issue was framed as to the plaintiff's title, and was decided in her favour, and a decree was passed for Rs. 140. The defendants' appeal was dismissed by the District Court.

The first issue in the present case raised the point as to whether the finding in favour of the plaintiff on the question of title in the prior suit operated as *res judicata*. The District Munsif held that it did and passed a decree in the plaintiff's favour. This decision was confirmed on appeal.

Defendants Nos. 1, 2 and 4 preferred this second appeal.

The case came in the first instance before Davies and Benson, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH :—An issue in the present suit before the District Munsif's Court on the Original Side is the same as an issue that was tried in the same Court between the same parties in Original Suit No. 973 of 1898.

The present suit is not one of a small cause nature, but Original Suit No. 973 of 1898 was a suit of a small cause nature, not more than Rs. 500 in value though tried as an original suit because beyond the pecuniary jurisdiction of the District Munsif on the Small Cause Side. For the purpose of this reference it may be taken that the facts are such that if Original Suit No. 973 of 1898 had not been of a small cause nature, the trial of the same issue in

the present suit would be barred as *res judicata* by the decision in the former suit.

The question for decision is whether, in these circumstances, the fact that the former suit was one of a small cause nature, prevents the decision in the former suit from operating as *res judicata* in the present suit.

It seems to us that there is a direct conflict of authority on the point. The decisions in *Vithilinga Padayachi v. Vithilinga Mudali*(1), *Namasivaya Gurukkal v. Kadir Ammal*(2) and *Sriranga Chariar v. Ramasamy Ayyangar*(3), show that the issue is not *res judicata*; while the decisions in *Subbammal v. Huddleston*(4), and *Ahmed v. Moidin*(5), show that it is *res judicata*. We therefore refer the question for the decision of the Full Bench.

The case came on for hearing in due course before the Full Bench constituted as above.

T. Subrahmania Ayyar for the Hon. Mr. P. S. Sivaswami Ayyar for appellants.

K. P. Govinda Menon for *S. Kusturiranga Ayyangar* for respondent.

The Court expressed the following

OPINION :—The question in the present case is whether the decision upon a matter which was directly and substantially in issue between the same parties in a suit, which, though tried by the District Munsif as an original suit was yet one of a small cause nature and therefore, in which no second appeal lay, is binding in respect of the same matter in a subsequent suit in which a second appeal lay.

This point first arose for decision in *Bholabhai v. Adesang*(6) and after full consideration West and Nanabhai Haridas, JJ., answered it in the negative. This case was followed by Sargent, C.J., and Telang, J., in *Govind bin Lakshmanshet Anjorlekar v. Dhondbarav bin Ganbarav Tambye*(7). In the meantime the same question arose in this Court in *Singarachariar v. Krishnasami*(8), but the learned Judges disagreed, Wilkinson, J., holding that the prior decision operated as *res judicata* and Kernan, J., holding otherwise. In *Vithilinga Padayachi v. Vithilinga Mudali*(1), which was the

(1) I.L.R., 15 Mad., 111 at p. 118.

(3) I.L.R., 18 Mad., 189 at p. 191.

(5) I.L.R., 24 Mad., 444.

(7) I.L.R., 15 Bom., 104.

(2) I.L.R., 17 Mad., 168 at p. 178.

(4) I.L.R., 17 Mad., 273.

(6) I.L.R., 9 Bom., 75.

(8) S.A. No. 1200 of 1887 (unreported).

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decision of a single Judge, the principle of the Bombay decisions was considered right, and it was held that the decision of a Subordinate Judge in a suit for an amount less than Rs. 5,000 in which an appeal on a point of law only was allowed was not *res judicata* in a subsequent suit for an amount over Rs. 5,000 in which an appeal lay not only on points of law but on the facts also. In *Namasivaya Gurukkal v. Kadir Ammal*(1), Muttusami Ayyar and Davies, JJ., relying on *Govind bin Lakshmanshet Anjorlekar v. Dhondbarav bin Gunbarav Tambye*(2) and *Vithilinga Padayachi v. Vithilinga Mudali*(3) rejected the contention that a former decision in a suit of a small cause nature operated as *res judicata* in a subsequent suit in which there was a second appeal. Again in *Sriranga Chariar v. Ramasamy Ayyangar*(4), Collins, C.J., and Davies, J., approved of the principle of the above cases. But in *Subbammal v. Huddleston*(5), Collins, C.J., and Shephard, J., dissented from the reasoning adopted in *Vithilinga Padayachi v. Vithilinga Mudali*(3) in regard to the question under consideration but made no reference to *Namasivaya Gurukkal v. Kadir Ammal*(1). In *Rai Charan Ghose v. Kumud Mohun Dutt Chowdhry*(6), Maclean, C.J., and Banerjee, J., held that the question whether a decision is *res judicata* or not should be answered without reference to the character of the appeals allowed in the two suits respectively and that if the Court which gave the first decision was competent to try the subsequent suit in regard to its subject matter and pecuniary value, that Court should be held to be a Court of competent jurisdiction within section 13, Civil Procedure Code. This case was followed in *Bhugwanbutti Chowdhry v. Forbes*(7). In *Ahmed v. Moidin*(8), Shephard and Bhashyam Ayyangar, JJ., following these Calcutta cases and *Subbammal v. Huddleston*(5) dissented from the Bombay decisions and those Madras cases which agreed with them. In doing so they state that *Subbammal v. Huddleston*(5) was not cited and was apparently overlooked in *Sriranga Chariar v. Ramasamy Ayyangar*(4).

It must be mentioned, however, that the latter case though reported in a later volume was in point of fact decided earlier than the former case by a few days and so it was impossible that

(1) I.L.R., 17 Mad., 168 at p. 178.
(3) I.L.R., 15 Mad., 111 at p. 118.
(5) I.L.R., 17 Mad., 273.
(7) I.L.R., 28 Calc., 78.

(2) I.L.R., 15 Bom., 104.
(4) I.L.R., 18 Mad., 189 at p. 191.
(6) I.L.R., 25 Calc., 571.
(8) I.L.R., 24 Mad., 444.

the former case could have been cited or noticed in the latter case, (*Ahmed v. Moidin*(1)) was cited with approval by Boddam and Bhashyam Ayyangar, JJ., in *Raja Simhadri Appa Row v. Ramachandrudu*(2).

In the face of so many authorities dealing more or less fully with the short question before us, it is obvious that no new important argument could be brought forward, and none, in fact, has been brought forward. We have to choose between the one or the other of the two views presented to us, and it must be admitted the question of construction of section 13 with reference to the present point is one of difficulty. Those learned Judges who hold, that in cases like the present, the decision in the earlier suit operates as *res judicata* take the view that the language of the section is satisfied when the Court deciding the first suit was competent to try the subsequent suit, irrespective of the question whether the earlier decision was or was not subject to the same appeal as the decision in the subsequent suit would be, and that a different interpretation would be straining the language of the legislature. Those learned Judges on the other hand who take the opposite view consider that the words "of jurisdiction competent" in the section admit of the provisions of law relating to appealability being considered in giving effect to the principle of estoppel which the section is intended to enforce and that, having regard to the difference in the grades of the Courts administering justice in this Country and the qualifications of Judges which differ greatly, it is better not to tie down, as far as possible, Courts of higher jurisdiction by the decisions of inferior Courts. Sir Barnes Peacock in the decision in *Mussamut Edun v. Mussamut Bechun*(3), which is referred to by the Judicial Committee in *Misir Raghobardial v. Sheo Baksh Singh*(4), as the leading case, and the Judicial Committee itself in that case lay much stress upon the said difference in the grades of Courts and the qualifications of Judges in connection with the question of estoppel by judgment, and the Committee further observe that "although it may be desirable to put an end to litigation the inefficiency of many of the Indian Courts makes it advisable not to be too stringent in preventing a litigant from proving the truth of his case."

(1) I.L.R., 24 Mad., 444.
(3) 8 W.R., 175.

(2) I.L.R., 27 Mad., 63.
(4) I.L.R., 9 Calc., 439.

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Overruling *Subbammal v. Huddleston*(1), *Ahmed v. Moidin*(2) and *Raja Simhadri Appa Row v. Ramachandrudu*(3) in so far as the last case relies on *Ahmed v. Moidin*(1) we hold here that the decision in the former suit does not operate as *res judicata* and the fact that the former suit was one of a small cause nature, prevents the decision therein from operating as *res judicata* in the present suit.

The appeal came on for final hearing in due course before Davies and Benson, JJ., when the Court delivered the following

JUDGMENT:—The opinion of the Full Bench is to the effect that the case was not *res judicata*. We set aside the decrees of the two lower Courts and remand the suit to the Court of the District Munsif for trial according to law. Costs in this and in the lower Appellate Court will abide the result.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice
Subrahmania Ayyar, and Mr. Justice Davies.

1905.
August 22.
November
9, 10.
December 6.

VENKATARAMANAYA PANTULU AND ANOTHER (PLAINTIFFS),
APPELLANTS,

v.

VENKATARAMANA DOSS PANTULU AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Hindu Law—Liability of son for father's debt—Sale or mortgage by father binding only when there is a debt existing prior to the sale or mortgage.

A sale or mortgage of joint family property by a father is binding on the son's share only when there is an antecedent debt, i.e., a debt existing prior to and independently of the sale or mortgage.

Where the debt is incurred at the time of sale or mortgage, it is not an antecedent debt within the meaning of those words as used in the judgment of the Privy Council in *Suraj Bansi Koer v. Sheo Pershad*, (I.L.R., 5 Calc., 148). *Chidambara Mudaliar v. Koothaperumal*, (I.L.R., 27 Mad., 326), dissented from; *Sami Ayyangar v. Ponnammal*, (I.L.R., 21 Mad., 28), approved.

(1) I.L.R., 17 Mad., 273.

(2) I.L.R., 24 Mad., 444.

(3) I.L.R., 27 Mad., 63.

* Second Appeal No. 704 of 1903, presented against the decree of E. B. Elwin, Esq., District Judge of Ganjam at Berhampore, in Appeal Suit No. 180 of 1902, presented against the decree of M.R.Ry. N. R. Narasimiah, District Munsif of Berhampore, in Original Suit No. 213 of 1901.

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SUIT to recover Rs. 166-6-6, the principal and interest due on a registered mortgage document executed on the 3rd April 1895 by the deceased father of defendants Nos. 1, 2 and 3, by defendants Nos. 4 and 5 and the deceased father of defendants Nos. 6 and 7 in favour of the plaintiffs' deceased father. The bond was not executed in consideration of any antecedent debt.

The District Munsif dismissed the suit on the ground that there was no consideration for the mortgage. On appeal the District Judge passed a decree in favour of the plaintiffs, but defendants Nos. 1 to 3 and 6 and 7 and their shares in the family property were not made liable.

Plaintiffs preferred this second appeal.

The question involved in the appeal was whether the shares of defendants Nos. 1 to 3 and 6 and 7 in the family property were bound by the mortgage.

The case came in the first instance before Davies and Benson, JJ., who made the following

ORDER OF REFERENCE TO FULL BENCH:—"The decision relied on by the District Judge (*Sami Ayyangar v. Ponnammal*(1)) has been dissented from in the subsequent decision of a Division Bench in *Chidambara Mudaliar v. Koothaperumal*(2). That being so, we think that the question ought to be authoritatively settled by a reference to the Full Bench.

"We, therefore, refer this question whether in order to justify a sale or a mortgage of joint family property by a father so as to bind the son's share there must be, in fact, an antecedent debt, i.e., a debt, prior to the mortgage or sale."

The case came on for hearing in due course before the Full Bench constituted as above.

K. S. Ramaswami Sastri for P. R. Sundara Ayyar and A. S. Balasubrahmania Ayyar for the appellants.

V. C. Seshachariar for the eighth and tenth respondents.

The Court expressed the following

OPINION:—The question for determination in this case is—Is a sale or a mortgage by a father of joint family property binding upon a son's share if there is no antecedent debt due by the father, i.e., no debt prior to the mortgage or sale.

(1) I.L.R., 21 Mad., 28.

(2) I.L.R., 27 Mad., 326.

VENKATA-
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In *Sami Ayyangar v. Ponnammal*(1), it was held that in order to justify a sale or a mortgage by a father so as to bind his son's share of the property, there must be in fact an antecedent debt. In the judgment in that case it was pointed out that, as regards the liability of the son's share for the debt of the father as a mere money claim, there could be no question in a case where the mortgage was for consideration and was not illegal or immoral; but it was held, following the rule which had been previously acted upon by this Court, that the son's share was not bound by the sale or mortgage unless there was an antecedent debt.

In *Chidambara Mudaliar v. Koothaperumal*(2), it was held that as regards the effect on the son's share there was no distinction in principle between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred. That case was a case of mortgage and not of sale, but the language of the judgment indicates that the Court was of opinion that in the case of sales and mortgages alike the same principle was applicable.

The question for us really is—Was the case (*Sami Ayyangar v. Ponnammal*(1)) rightly decided? We are of opinion that it was. The question appears to us to be governed by authorities which are binding upon this Court. In *Suraj Bansi Koer v. Sheo Persad Singh and others*(3), the Privy Council in discussing *Muddun Thakoor v. Kantoo Lall*(4), observe that that case was an authority for the proposition that “where joint ancestral property has passed out of “joint family, either under a conveyance executed by a father in “consideration of an antecedent debt, or in order to raise money “to pay off an antecedent debt, or under a sale in execution of a “decree for the father's debt, his sons, by reason of their duty to “pay their father's debts, cannot recover that property, unless “they show that the debts were contracted for immoral purposes, “and that the purchasers had notice that they were so contracted.” In a later Privy Council case we find the phrase ‘antecedent debt’ adopted by Lord Hobhouse. In delivering the judgment of the Privy Council in *Nanomi Babuasin v. Modhum Mohun*(5), Lord Hobhouse observes “destructive as it may be of the principle of “independent coparcenary rights in the sons, the decisions have, for “some time, established the principle that the sons cannot set up

(1) I.L.R., 21 Mad., 28.
(3) I.L.R., 5 Cal., 148.
(5) I.L.R., 13 Cal., 21.

(2) I.L.R., 27 Mad., 326.
(4) L.R., 1 I.A., 333.

“their rights against their father's alienation for an antecedent “debt, or against his creditor's remedies for their debts if not “tainted with immorality” in *Bhagbut Pershad Singh v. Girja Koer and others*(1) the debt was in fact antecedent in the sense that it existed prior to the sale. Sir Barnes Peacock in delivering the judgment of the Privy Council cites the passage in the judgment delivered by Lord Hobhouse referred to above. In the Privy Council case of *Mahabir Pershad v. Moheswar Nath Sahai*(2) the debt was, in fact, antecedent to the sale. It seems to us that it is impossible to adopt the view taken in *Chidambara Mudaliar v. Koothaperumal*(3) although, on principle, we might be disposed to do so, without ignoring, or placing a forced and unnatural meaning on the word ‘antecedent’ as used in the judgments of the Privy Council in the cases referred to, and we do not think we are warranted in so doing.

So far as the decisions of the other High Courts in this country are concerned, there are, no doubt, decisions to the effect that a mortgage may be binding on the son's share even when the debt is the debt created by the mortgage transaction itself. These decisions proceed upon the ground that in such a case the debt is an antecedent debt within the meaning of the Privy Council rulings. This was the ground of the decision in *Khalilul Rahman v. Gobind Pershad*(4) in which the Calcutta High Court followed a Full Bench decision of that Court (see *Luchmun Dass v. Giridhur Chowdhry*(5)). In the Bombay case (*Chintaman Rao v. Kashinath*(6)), the judgment proceeded upon the same ground. In the Allahabad case (*Debi Dat v. Jadu Rai*(7)), the Allahabad High Court held, without discussing the rulings of the Privy Council, that the sons could only dispute the validity of a mortgage by the father (and by ‘validity’ the learned Judges meant the binding effect as regards the sons' shares) either on the ground that the debt was never incurred, or was no longer in existence, or that it was tainted with immorality.

As regards this High Court, the view taken in the cases of *Chinnayya v. Perumal*(8) and of *Sami Ayyangar v. Ponnammal*(9)

(1) I.L.R., 15 Cal., 717.
(3) I.L.R., 27 Mad., 326.
(5) I.L.R., 5 Cal., 855.
(7) I.L.R., 24 All., 469.
(9) I.L.R., 21 Mad., 28.

(2) I.L.R., 17 Cal., 584.
(4) I.L.R., 20 Cal., 328.
(6) I.L.R., 14 Bom., 320.
(8) I.L.R., 13 Mad., 51.

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and in *Srinivasa Ayyangar v. Ponnammal*(1) was that when the debt was incurred at the time of the sale or mortgage it was not an antecedent debt within the meaning of those words as used in the judgment of the Privy Council in *Suraj Bansi Koer v. Sheo Persad Singh*(2). As regards the question of sale there does not appear to be any decision either of the Privy Council or of the Courts of this country that a sale is binding on the son's share when the debt was not antecedent in the sense that it existed prior to, and independently of, the sale.

We are of opinion that the answer to the question referred to us must be in the affirmative.

The appeal came on for final hearing in due course before Davies and Benson, JJ., when the Court, after the expression of the opinion of the Full Bench, delivered the following

JUDGMENT :—It is now urged that the District Judge has not clearly and distinctly held that the debt was not contracted for the marriage expenses of the sister of the defendants Nos. 1, 2 and 3. There cannot, in our opinion, be any doubt as to the meaning of the District Judge's judgment as to this. He finds that the debt is said to have been contracted for marriage expenses, but that there is, as a matter of fact, no evidence as to whether the money was spent on a marriage or when that marriage took place. The District Judge might in fact have gone further and stated that there is no evidence on the record that there ever was any marriage. The decision of the Full Bench, on a reference in this second appeal passed on the 6th December 1905, removes all doubt as to whether the decision in *Sami Ayyangar v. Ponnammal*(3) or that to be found in *Chidambara Mudaliar v. Koothaperumal*(4) should be followed by this Court in deciding this second appeal and lays down clearly that in order to justify a sale or mortgage of joint family property by a father so as to bind the son's share there must be an antecedent debt, i.e., a debt prior to the mortgage or sale. The vakil for the plaintiffs (appellants) now that the above-mentioned points have been decided against him, tries to raise certain further questions as to the liability of defendants Nos. 6 and 7. It is perfectly clear that these questions were not raised or argued before the District Judge in the lower Appellate

(1) L.P.A. No. 12 of 1893 (unreported).
(3) I.L.R., 21 Mad., 28.

(2) I.L.R., 5 Cal., 148.
(4) I.L.R., 27 Mad., 326.

Court, and such being the case we are decidedly of opinion that we should not allow them to be raised now for the first time in second appeal. This second appeal is dismissed. The plaintiffs (appellants) will pay their own costs and those of the tenth defendant. There will be no order as to the costs of the other parties.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

VENKATARAMIAH PANTULU (PLAINTIFF), APPELLANT,

v.

RAVAKRISHNA PANTULU (DEFENDANT), RESPONDENT.*

1906.
January 19.

Right of suit—Agreement in subsequent deed to pay balance due on a prior document, gives no fresh right of suit when previous obligation not discharged.

Where a promissory note had been executed by the defendant in favour of the plaintiff and some time afterwards the defendant by another document assigned certain decrees to the plaintiff and the document provided that the amounts realized by executing the decrees should be credited towards the amount due on the promissory note and that the defendant should pay any balance that may remain due after the decrees had been realized but the original promissory note had not been cancelled or returned to the defendant or otherwise discharged :

Held, that the plaintiff's only claim was on the promissory note and that the subsequent document conferred no fresh right of suit and that the plaintiff's suit brought after the expiry of the period of limitation for a suit on the promissory note was barred.

Barker's claim, ((1894), 3 Ch.D., 290), referred to and applied.

THE defendant borrowed from the plaintiff Rs. 12,500 for which, on the 29th day of November 1895, the defendant executed in favour of the plaintiff an on-demand promissory note carrying interest at the rate of 12 per cent. per annum.

On the 2nd July 1898 the defendant after looking into and settling his account with the plaintiff executed and delivered to the plaintiff a registered deed for Rs. 13,465-12-0.

The material portion of the deed is as follows :—

I have hereby assigned and given over the aforesaid decree to you. As I have transferred to you all the right title and interest

* Original Side Appeal No. 42 of 1905, presented against the judgment and decree of Mr. Justice Boddam in Civil Suit No. 42 of 1904.

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which I possessed thereunder against the said defendants and against the property, you should therefore exercise all powers possessed by me in executing the said decree, yourself, conduct all necessary proceedings, collect and recover the whole of the principal and interest due to me under that decree and credit the remaining money, after deducting all expenses to be incurred therefor from the amount to be so collected and recovered, towards the principal and the interest accruing at a rupee per 100 per mensem for the amount of debt due by me to you in shape of Rs. 16,465-12-0 accruing up to this day as per promissory note executed and given by me on the 28th of November 1895. I bind myself to make good (and pay) to you separately the debt which may be left after deducting the amount which you may recover under this decree.

The plaintiff sued for the recovery of the amount alleged to be due under the agreement to pay the balance contained in the deed of 2nd July 1898.

The plaintiff's suit was dismissed by Boddam, J. The material portion of his Lordship's judgment is as follows:—

The question is has the plaint promissory note been discharged by the document put in?

I am of opinion that the promissory note is not discharged by the document put in.

There is no discharge of the original debt or of the promissory note expressed in the document but it is argued that because it contains a promise to pay it creates a new contract discharging the promissory note. I think there is no fresh contract created by the document. It merely contains an acknowledgment of the existence of a debt under the promissory note and a promise to pay the balance after the decree assigned has been realised. So far as the promise to pay is concerned that alone creates no contract and gives no cause of action. It is a promise and nothing more. It is an acknowledgment during the currency of the Statute of Limitations of the existence of a debt and a promise to pay it without any discharge of the promissory note or requiring the plaintiff to give up his right of action under it. The only effect it has is to bring into operation section 19 of the Limitation Act and to give a fresh starting period to the currency of the Statute of Limitations "according to the nature of the original liability," viz., under the promissory

note and does not create a fresh contract or discharge the promissory note.

The Hon. Mr. P. S. Sivaswami Ayyar and V. Raghunatha Sastri for appellant.

V. Krishnaswami Ayyar and K. Subrahmania Sastri for respondent.

JUDGMENT.—The question in this appeal is whether the plaintiff's suit is sustainable. A promissory note was executed by the defendant to the plaintiff on the 28th November 1895. On the 2nd July 1898 exhibit A was executed by the defendant to the plaintiff. The present suit is based on a fresh contract said to be evidenced by exhibit A, which it is urged, operated as a discharge of the obligation of the defendant under the promissory note. It is not alleged in the plaint that the promissory note was cancelled or returned to the defendant. That the note remained with the plaintiff, uncanceled, was expressly asserted, before the learned Judge, on behalf of the defendant and no attempt was made to refute the allegation. Even in the grounds of appeal there is no reference to this matter. Though, therefore, in the course of the argument the appellant's vakil stated that he was instructed to say that the document had been returned to the defendant, we must proceed on the footing that this was not so. The question, then, is whether exhibit A operated to extinguish the obligation under the promissory note and gave the plaintiff a fresh right of suit.

The case of Barker's claim(1) is an authority against this contention. No doubt there is this difference in regard to the facts in the two cases, that the writing relied on in that case by the plaintiff was given on the same day on which the advance was made; whereas in this case there was an interval, but we do not think that this affects the question. The Court of appeal, reversing the decision of North, J., was of opinion that the provision in the letter that the defendant should pay the balance that might be due after deducting the sale-proceeds of the security, did not imply an undertaking on the part of the plaintiff to forbear to sue, and was no more than an explicit statement of a liability to which the defendant was already subject, and therefore, gave no independent right of action to the plaintiff. The Court

(1) (1894) 3 Ch.D., 290.

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held that as the claim was not brought within the period of limitation calculated from the time of the advance, the plaintiff's right was barred.

It seems to us that similarly in the present case the obligation under the note was the only one on which the plaintiff was entitled to sue and that the provision in exhibit A as to the realization of the decree debt and the payment of the balance, if any, did not affect the right of the plaintiff to sue on the promissory note, or create an independent right of suit in favour of the plaintiff. It follows that as the present suit was brought after the expiry of the period of limitation which would have governed the suit if brought upon the note, and taking account of the fact that exhibit A contains an admission of liability within the meaning of section 19 of the Limitation Act, we must hold that the decree of the learned Judge dismissing the suit is right. In this view it is not necessary to go into the cross claim made by the defendant. We dismiss this appeal with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

THAKDI HAJJI (DEFENDANT), APPELLANT,

v.

BUDRUDIN SAIB (PLAINTIFF), RESPONDENT.*

Malicious arrest, action for—Not maintainable when arrest ordered by officer invested with discretionary power, before whom the full facts were placed by the defendant.

An action for malicious arrest is not sustainable, when the defendant has placed all the facts before the officer having the discretionary power to order such arrest and when such officer with full knowledge of all the facts exercised his discretion and ordered the arrest.

In an action for false imprisonment the onus is on the defendant to plead and prove affirmatively the existence of reasonable cause, whereas, in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non-existence.

Hicks v. Faulkner, (51 L.J.Q.B., 268), referred to.

* Original Side Appeal No. 21 of 1905, presented against the judgment of Mr. Justice Boddam in Civil Suit No. 69 of 1904.

The facts necessary for this report are fully set out in the judgment.

Mr. E. Norton, Mr. D. Chamier and Mr. A. Read for appellant.

The Advocate-General (Hon. Mr. J. P. Wallis) for respondent.

JUDGMENT.—This is an appeal from a judgment of Boddam, J., by which the learned Judge awarded the plaintiff Rs. 1,000 damages in a suit for damages for malicious arrest.

The material facts and dates are shortly as follows:—

On January 6th 1904, the defendant obtained a decree against the plaintiff for Rs. 40,000 with interest and costs. On January 25th, on an *ex parte* application by the plaintiff for a stay of execution pending appeal, an order was made that notice should go to the defendant to show cause why the order should not be made, and an interim stay was granted on the terms of the plaintiff paying into Court, within three days, the amount of the decree with interest and costs. The amount of the decree with interest and costs was paid into Court by the plaintiff.

On February 11th the application for a stay of execution was dismissed with costs. No formal order was made discharging the order for an interim stay.

The defendant applied for the payment out to him, of the money which had been paid into Court and, on February 22nd the Court made an order that the money should be paid out to the defendant on his giving security for the amount. The defendant was unable or unwilling to give security and the money remained in Court.

On March 5th the defendant's solicitors wrote to the plaintiff's vakil "With regard to the amount payable under the decree in respect of which we applied for payment out of Court and in view of the fact that your client took an unnecessary objection to such payment and asked that security should be given by our client, we give you notice that our client does not intend to apply for payment out of this sum and your client is at liberty to receive the said sum out of Court. We shall give your client time to obtain this money and shall then proceed to execute the decree."

On March 14th the defendant made an application in execution in which he asked that a warrant should issue for the arrest of the plaintiff. On March 15th the warrant was issued and the plaintiff was arrested.

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The plaintiff's contention was that the money had been paid into Court in satisfaction of the decree, that the decree had been satisfied in fact and in law and that the order for the issue of the warrant was illegal. The defendant's contention was that the money had not been paid into Court in satisfaction of the decree, but as a condition precedent to the plaintiff obtaining an interim order for the stay of execution, that, inasmuch as he (the defendant) was precluded by the order of the Court, from taking the money out except upon the terms of giving security, the decree had not been satisfied, and this being so, any remedy which the law allowed him, by way of execution, was still open to him.

It is not necessary for us to decide whether the payment into Court by the plaintiff of the amount of the decree obtained by the defendant against him with interest and costs, is to be regarded, in the events which had happened, as a payment into Court in satisfaction of the decree. We assume that the payment into Court was in law a payment in satisfaction of the decree and that, this being so, the order directing that the warrant should issue for the arrest of the plaintiff was an order which ought not to have been made. On this assumption we have to consider whether the defendant in applying for the warrant acted without reasonable and probable cause.

Mr. Branson, a member of the firm of solicitors, who acted for the defendant, was called as a witness on the defendant's behalf. With reference to the application for the issue of the warrant Mr. Branson said "I saw Mr. Bakewell (the Deputy Registrar) who had to pass the order, personally, on the matter. It is issued under the rules. I told him exactly what had taken place. We discussed the question whether there had been any stay of execution. He passed the order for a warrant." Mr. James Bakewell (the Deputy Registrar) was called and he said "I see this execution application filed on 14th March 1904. I recognise my endorsement on it. I can't say I remember this application. I remember an execution application being made in this matter. I remember I had an interview with Mr. Branson. I remember something passed between us in addition to handing in the application. I made the order."

An order for the execution of a decree by arrest is a discretionary order. Rule 542 of the Original Side Rules provides that the

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Registrar shall have power in his discretion to make the order, with a proviso that he may, if he thinks fit, refer the matter to a Judge in Chambers, who may thereupon make such order as he thinks fit. We must take it therefore that the Deputy Registrar was of opinion on the facts stated to him by Mr. Branson (Mr. Branson says he stated the facts fully and the Deputy Registrar does not suggest otherwise) that the case was one in which an order for arrest ought to be made and he made the order accordingly. In the absence of any suggestion of fraud or suppression of facts we are of opinion that it cannot be said that a party acted without reasonable and probable cause in applying for an order which the Court thought was a proper order, in the exercise of its discretion to make, and which the Court, in fact, did make. With regard to the case of the *Quartz Hill Consolidated Gold Mining Company v. Eyre*(1) which was cited by the Advocate-General on behalf of the respondent, all that need be said is that the winding up petition, which was held to have been presented without reasonable or probable cause, was withdrawn before any order was made upon it and was ultimately dismissed.

An action for maliciously prosecuting proceedings to make a man a bankrupt or wind up a company will only lie when the application has failed or the order made thereon has been rescinded. See the case cited above and *Whitworth v. Hall*(2) and *Metropolitan Bank v. Pooley*(3).

In defence to the present suit the defendant pleaded that the order for the issue of a warrant of arrest was made by an officer of the Court who is empowered to exercise a discretion judicially, and with knowledge of all the facts. The defendant proved the facts here alleged, and we are of opinion that they constitute a good defence, and that this is so whether the suit be regarded as a suit for damages for malicious prosecution or a suit for damages for malicious arrest.

No doubt in an action for false imprisonment the onus is on the defendant to plead and prove affirmatively the existence of reasonable cause, whereas in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non-existence. See *Hicks v. Faulkner*(4).

(1) L.R., 11 Q.B.D., 674.

(2) L.R. 10 A. C., 210.

(3) 2 B & Ad. 695.

(4) 51 L.T., Q.B., 268, affirmed in 46 L.T., 127.

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If the present case is to be regarded as one in which the onus is on the defendant, we are of opinion that he discharged that onus.

Upon the short ground stated above we allow the appeal and set aside the decree. In the circumstances we direct that each party pay his own costs in this Court and in the Court of first instance. Memorandum of objections is dismissed.

Messrs. *Branson & Branson*—Attorneys for appellant.

Messrs. *Short & Bewes*—Attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

1905.
November 30.
December
1, 7.

SOMASUNDARAM CHETTIAR (PLAINTIFF), APPELLANT,

v.

NARASIMHA CHARIAR AND OTHERS (DEFENDANTS NOS. 1 AND 2
AND LEGAL REPRESENTATIVES OF THE DECEASED SECOND
DEFENDANT), RESPONDENTS.*

*Promissory note—Collateral covenant not to sue for limited time no bar to suit on—
Indorsee with notice of covenant may sue.*

A collateral covenant not to sue for a limited time on a promissory note does not suspend the right of action on the note and cannot be pleaded in bar to an action on the note.

Thimbleby v. Barron, (3 M. & W., 210), referred to and followed.

Ray v. Jones, (9 C.H.R. (N.S.), 418), referred to and followed.

The payee of a promissory note executed an agreement in the following terms:—"You will ever from the 1st of May be paying interest to me on account of the (promissory) note for Rs. 5,000 executed this day by you in my favour, the interest for every month being sent on the first of the next month. I shall take the above rupees five thousand from you after giving *jivanamsam* (maintenance money) to my mother-in-law, and obtaining a release bond; or I will take the said rupees five thousand after the lifetime of my mother-in-law."

Held, that this agreement was only a collateral covenant not to sue for a limited time and was no bar to an action by an indorsee with notice of the agreement.

* Appeal No. 101 of 1902, presented against the decree of M.R.Ry. P. M. Ranga Chari, Subordinate Judge of Madura (West), in Original Suit No. 13 of 1901.

V. Krishnaswami Ayyar and *S. Srinivasa Ayyangar* for appellant.

The Hon. Mr. *V. C. Desikachariar* for first respondent.

K. Kuppuswami Ayyar for third respondent.

W. Ramakrishna Lal for fourth and fifth respondents.

SUIT to recover the amount due on a promissory note. The facts necessary for this report are fully set out in the judgment.

JUDGMENT.—The second defendant, a Hindu widow, who is now dead, sold to the first defendant on the 31st March 1900 some property inherited by her from her husband for the sum of Rs. 15,000. Of this amount, Rs. 5,000 were left in the hands of the first defendant, who gave for it the promissory note sued on which was made payable on demand to the payee, or order, with interest at 9 annas per cent. per annum. At the same time the second defendant handed to the first defendant the letter (Exhibit IX) which runs as follows:—"You will ever from the 1st of May be paying interest to me on account of the (promissory) note for Rs. 5,000 executed this day by you in my favour, the interest for every month being sent on the first of the next month. I shall take the above rupees five thousand from you after giving *jivanamsam* (maintenance money) to my mother-in-law, and obtaining a release bond; or I will take the said rupees five thousand after the lifetime of my mother-in-law."

The interest due on the promissory note was paid up to the end of October 1900. On the 25th December of that year the note was endorsed to the plaintiff, a Nattukottai Chetti, by the second defendant, the endorsement being as follows:—"As I have received "the principal sum of this note (Rs. 5,000) five thousand, and the "interest (due) from the month of November of this year from "Devakottai A. R. P. Somasundaram Chettiar Avargal on the 25th "December 1900, the said principal sum of Rs. 5,000 and the "subsequent interest from the month of November aforesaid should "be paid to the said Somasundaram Chettiar Avargal or the order "of the said person."

The Subordinate Judge dismissed the suit being of opinion that the plaintiff paid no consideration for the endorsement to him and that the plaintiff was aware of the arrangement between the defendants evidenced by the letter (Exhibit IX). In this appeal these findings were impeached, and it was further contended that, there being no question about the consideration for the promissory

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note itself, the plaintiff, even if not as the holder in due course of the note, was entitled to recover in spite of the findings of the Subordinate Judge, inasmuch as the promise on the part of the second defendant was a covenant not to sue for a limited time only and therefore no defence to such an action as the present. Apart from the presumption in favour of the plaintiff under section 118 of the Negotiable Instruments Act, the evidence as to the payment of consideration for the endorsement is all one way. He himself says he paid Rs. 5,000 in currency notes and silver coin. Chidambaram Chetti, a very well-to-do trader and a relation of the plaintiff, supports that evidence and proves that the money paid by the plaintiff to the second defendant was lent by him to the plaintiff for the purpose. He adds that the said amount had been received by him in Madras four days previously from his branch place of business in the Coimbatore District and produces his codjan account containing entries regarding the receipt of the money and the payment thereof to the plaintiff. Srinivasa Aiyangar, gumastah of Chidambaram Chetti, who brought the money from Coimbatore, gives evidence to the same effect as that of Chidambaram Chetti and of the plaintiff, and proves his attestation to the endorsement. S. Gurusami Chetti, another attesting witness to the endorsement, who was a friend of the second defendant and who apparently brought about the negotiation of the note, also testifies to the payment to the second defendant. As against this the first defendant adduced no evidence on this point. The second defendant, who was alive at the time of the trial, was cited on behalf of the plaintiff but was unfortunately not examined, the Subordinate Judge having refused either to issue a commission for her examination or to compel her appearance as a witness though the plaintiff applied for the issue of a warrant for her production, when she, on the Subordinate Judge's refusal to issue the commission for her examination out of Court, declined to appear as a witness in Court.

In the argument before us Mr. Desika Chariar for the first defendant sought to support the view of the Subordinate Judge that the real promoter of the suit was Chidambaram Chetti, that the plaintiff was a tool in his hands and that both were endeavouring to recover the money for the benefit of the second defendant, who had bound herself by the letter (Exhibit IX). This view does not seem to have been suggested by the first defendant in his written

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statement but is a surmise of the Subordinate Judge unsupported by any evidence on behalf of that defendant or otherwise. The sole basis for the surmise is the improbability that Chidambaram and still less the plaintiff would have parted with so large a sum as Rs. 5,000 in consideration of the endorsement of a promissory note by a party who had bound herself by the letter (Exhibit IX), not to claim payment except on one or other of the contingencies therein mentioned. This improbability may suggest that the whole of the money said to have been paid to the second defendant as consideration for the endorsement was not paid. It is not sufficient to support the view that both the Chetties have embarked upon this litigation for the simple purpose of helping the second defendant in the way supposed. It is not said that the plaintiff and the second defendant had any previous acquaintance or dealings which would induce him to carry on this litigation for her benefit. As regards Chidambaram Chetti that is even less credible, inasmuch as months before the endorsement in question, the second defendant had failed to repay him the sum of Rs. 500 she had borrowed from his place of business in Madura through his witness Srinivasa Aiyangar, and the necessity for a suit by him against her had become manifest, at the time of the endorsement, the suit itself being instituted in January 1901 and being actually pending at the time the present action was brought against both the defendants. In the course of the cross-examination of Gurusami Chetti, it was suggested that he had given a guarantee to the Chetties with reference to the endorsement of the promissory note. This, in a way, implied that there was consideration for the endorsement. It is quite unlikely that the second defendant who was already in debt to Chidambaram Chetti would have parted with the promissory note without receiving any consideration from the plaintiff or Chidambaram Chetti.

It is probable, as already hinted, that she did not receive all the five thousand rupees stated to have been paid to her, though as to what she actually received, the matter is one for conjecture only. It is difficult to avoid the conclusion that there was consideration for the endorsement and that the plaintiff entered into the transaction in the hope of being able to make a profit, having regard to the fact that the first defendant's indebtedness for the amount of the promissory note was undeniable and that he was a solvent man.

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As regards the question whether the plaintiff had notice of the agreement entered into by the second defendant with the first defendant under Exhibit IX, no doubt the plaintiff denies it. On the other hand, the first defendant's witness Subbaraya Aiyar states that he himself told the plaintiff of the letter before the note was endorsed to the latter. The Subordinate Judge has not placed any reliance upon this witness' evidence. Nevertheless it is altogether difficult to believe that the plaintiff was ignorant of the agreement. The second defendant had previously endeavoured to negotiate the note with a firm of jewellers in Madras, but had failed owing to the objection of the first defendant. Shortly afterwards the first defendant got a notice published in the local official gazette referring to the letter and warning people against the risk they would run in taking the note from the second defendant. Considering the previous dealings between Chidambaram Chetti and the second defendant it is altogether unlikely that the Chetties had not heard of the existence of the agreement at the time the endorsement was made. We are therefore unable to say that the Subordinate Judge's conclusion in regard to this point is erroneous.

The further question is whether, assuming that the plaintiff was aware of the agreement before the note was endorsed to him, such knowledge on his part disentitles him to sue for the money due under the promissory note. The first defendant admitted in his evidence that when he and the second defendant were entering into the arrangement the second defendant would not consent to what is stated in the letter finding a place in the same document that was to contain the promise on the part of the first defendant to pay the five thousand rupees. He having thus consented to the arrangement being effected by two such distinct instruments, it cannot possibly be taken that the intention of the parties was otherwise than to keep the two documents as evidence of two separate contracts. In this view the letter operates only as a collateral covenant not to sue for the money due under the promissory note for a limited time. *Thimbleby v. Barron*, (1) *Ray v. Jones* (2) and the other authorities to which Mr. Krishnaswami Aiyar drew our attention show, that such a covenant does not suspend the right of action on the note and that the covenant cannot be pleaded in bar to the action.

(1) 8 M. & W. 210.

(2) 9 C.B.R. (N.S.), 416.

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The second defendant herself could have, therefore, maintained the suit and the plaintiff is not the less entitled to do so. In this view it is unnecessary to enter into the question raised by Mr. Desika Chariar that the endorsement on the note was, with reference to section 56 of the Negotiable Instruments Act, such as not to confer on the plaintiff a good title to the note under the law merchant.

The decree of the Subordinate Judge is reversed and the plaintiff's claim allowed with interest on the principal Rs. 5,000 at six per cent. per annum till payment. The plaintiff did not in the lower Court rely on the contention with reference to Exhibit IX on which he succeeds here. We direct that in the lower Court each party will bear his costs. The first defendant will pay the plaintiff's costs of this appeal.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

KRISHNA AYYAR AND OTHERS (DEFENDANTS NOS. 2 TO 5),
APPELLANTS,

v.

MUTHUKUMARASAWMIYA PILLAI AND OTHERS (PLAINTIFFS
AND DEFENDANTS NOS. 1, 6, 7, 8 AND 9), RESPONDENTS.*

Transfer of Property Act IV of 1882, s. 85—Does not authorise Court to introduce unnecessary complications—Mortgages not compellable to distribute liability among mortgaged properties—Contribution, right of against properties not included in suit—Marshalling not compellable so as to prejudice mortgagee—Power of Court executing mortgage decree.

There is nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of the equity of redemption the mortgagee is bound to distribute his debt rateably upon the mortgaged properties.

Timmappa v. Lakshamma, (I.L.R., 5 Mad., 385), referred to.

He may, however, be compelled to do so when by his act he has prejudicially affected the rights of the holders of the properties to contribution among

* Appeal No. 24 of 1903, presented against the decree of M.R. Ry S. Duraiswamy Ayyangar, Subordinate Judge of Tinnevely, in Original Suit No. 10 of 1902.

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themselves. Where some only have been compelled to pay the whole debt, they are entitled to contribution from the other parties who are liable, though the properties in their hands have not been included in the suit.

Jagat Nurain v. Qutub Husain, (I.L.R., 2 All., 807), followed.

Chagandas v. Gansing, (I.L.R., 20 Bom., 615), followed.

Semle: Where, however, the mortgagor sells not merely the equity of redemption but conveys a portion of the property itself free from any liability to contribute to the mortgage debt, the purchaser may insist upon the mortgagee proceeding, in the first instance, against the property in the hands of the mortgagor. Marshalling cannot be enforced so as to compel a mortgagee to proceed against a security which may be insufficient or may involve him in litigation to realise.

Flint v. Howard, ((1893), 2 Ch.D., 54), distinguished.

Ram Dhun Dhur v. Mohesh Chunder Chowdhry, (I.L.R., 9 Calc., 406), distinguished.

Obiter: It is competent to the Court in executing a mortgage decree to exercise its control in bringing the different items of property comprised in the decree to sale in a particular order to adjust the equities of the parties before it who are interested.

Suit for the recovery of Rs. 9,000, being the amount of principal and interest due on a registered hypothecation bond, dated the 21st June 1896, for Rs. 5,000 executed by the first defendant in favour of the plaintiff's father Ramalingam Pillai deceased. Under the bond four schedules of property were hypothecated, but the plaintiff did not ask for a decree against item C in the fourth schedule, because the plaintiff's father had granted a release in respect of this item of property in favour of a subsequent mortgagee from the first defendant, or against the one-third share of the first defendant's brother's sons, because in other suits brought by the first defendant's mortgagees the shares of the brother's sons were exonerated, and in the razinamah entered into between the first defendant and his brother's sons in the partition suit (Original Suit No. 54 of 1896), it was provided that the first defendant should pay the debts contracted by him. The defendants Nos. 2 to 7 were impleaded as they were subsequent purchasers of portions of the hypothecated property and the defendants Nos. 8 and 9, as they were prior mortgagees of some portions of the property.

The defendants Nos. 1 and 6 were *ex parte*, and the seventh defendant disclaimed any interest in item B in the fourth schedule; the defendants Nos. 8 and 9 asserted their prior mortgage claim, which was not denied by the plaintiff. The defendants Nos. 2 to 5 were the really contesting defendants and they pleaded that the

plaintiff had fraudulently omitted to claim relief against the one-third share of the first defendant's brother's sons and item C in schedule IV, that the suit was bad for non-joinder of the first defendant's brother's sons as defendants, that a deduction must be made in the plaint amount proportionate to the value of the properties not included in the suit and that the plaint bond was a fraudulent transaction for which no consideration passed.

The issues were—

(a) Whether the plaintiff had fraudulently omitted to join the first defendant's brother's sons in the suit.

(b) Whether the suit was bad for non-joinder of these persons as defendants.

The Subordinate Judge decided this issue in favour of the plaintiff and passed the usual mortgage decree. Defendants Nos. 2 to 5 preferred this appeal.

V. Krishnaswami Ayyar and *R. Sivarama Ayyar* for appellants.

Sir V. Bhashyam Ayyangar and *M. R. Ramakrishna Ayyar* for first respondent.

K. Srinivasa Ayyangar for second and fifth respondents.

V. Krishnaswami Ayyangar for sixth respondent.

JUDGMENT.—Ramalingam Pillai, the deceased father of the plaintiff, a minor, obtained from the first defendant on the 21st June 1896, a bond for Rs. 5,000 on the hypothecation of certain lands, to which the first defendant and the two sons of his deceased brother, members of a joint family, were entitled, the debt being recited to be one binding on all the members subsequent to the mortgage, the first defendant became by purchase from one of his nephews entitled to a two-thirds share in the joint property instead of to one-half as originally. Of the other defendants, the second to the seventh inclusive, are impleaded as persons entitled to the equity of redemption in some or other of the properties hypothecated to the plaintiff they having acquired such interests in Court sales held in execution of decrees against the first defendant, and the eighth and the ninth defendants are holders of prior mortgages on the properties comprised in the plaintiff's mortgage. In the present suit the plaintiff prayed for a decree against the first defendant and only against his two-thirds share of the mortgaged property, excluding the third share belonging to first nephew who had not parted with his interest, it being stated in the plaint

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that the plaintiff apprehended there were difficulties in establishing that the debt was binding on that nephew's share.

The Subordinate Judge overruled the objection raised by the appellants (defendants Nos. 2 to 5) to the frame of the suit in so far as the nephew's third share was excluded, and granted a decree to the plaintiff as prayed for.

It was said on behalf of the appellants that Ramalingam Pillai being the maternal uncle of the nephew, the object of the exclusion of his share from the suit was to throw the entire debt upon the share purchased by the appellants and save that of the nephew from liability to the debt to which it was justly subject. The evidence which the nephew may produce against the contention that his one-third share is bound by the debt not having been taken, no final conclusion on this point can be arrived at, and though the evidence on which the appellants rely tends to support their contention that the nephew's share also is bound yet the matter cannot be said to be free from doubt. Consequently, it is not to be taken that the next friend of the plaintiff in refraining from impleading the nephew and from litigating the matter with him was acting otherwise than in the interests of the plaintiff.

The question is whether in the circumstances of the case it is open to the plaintiff to proceed against the two-thirds share which had vested in the mortgagor and which has since passed to defendants Nos. 2 to 7 to the exclusion of the one-third share of the nephew.

The answer to the question must, we think, be in the affirmative. The only sections of the Transfer of Property Act that can be thought of as having any sort of bearing on the present question are as pointed out by Sir V. Bhashyam Ayyangar, but four or five.

Now section 56, as its very position, as part of chapter III, shows, lays down a rule governing the rights and obligations as between the buyer and the seller with reference to the instance provided for the section. Section 81 deals with marshalling of securities where the owner of two properties mortgages them both to one person and then mortgages one of the properties to another person who has not notice of the former mortgage. Section 82 provides that, where several properties, whether of one or of several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute

rateably to the debt secured by the mortgage, according to the net value of the properties at the time, this provision being inapplicable to a property liable under section 81 to the claim of a second mortgagee. Section 95 gives to one of several mortgagors who redeems the mortgaged property a charge on the share of each of the other co-mortgagors for his proportion of the expenses, properly incurred in redeeming and obtaining possession. Section 60 of the Act confines the right of a person interested in but a share of the mortgaged property to redeem his share only to cases where the mortgagee has acquired in whole, or in part, the share of a mortgagor. It is scarcely necessary to say that there is nothing in any of these sections suggesting the view that as between a mortgagee in the position of the plaintiff and holders of the equity of redemption such as the appellants are, the law compels the former to distribute his debt, upon the mortgaged property rateably so as to entitle the latter to insist upon their interest not being proceeded with until after the nephew's one-third share has been proceeded against.

Passing to the decided cases cited by Sir V. Bhashyam Ayyangar they more than support the conclusion in favour of the plaintiff. In *Timmappa v. Lakshamma*(1) the mortgagee had obtained a decree for the sale of the mortgaged properties on account of the mortgage debt. After the decree was passed the equity of redemption in one of the properties was purchased at a Court sale in execution of a money decree against the mortgagor. Subsequent to this Court sale, the property, thus sold, was sold in execution of the mortgage decree and purchased by the mortgagee himself. It was held that the purchaser under the money decree was not entitled to insist on the mortgagee recovering what was due to him from the other mortgaged properties and that the purchaser at the money decree sale was bound, if he wished to redeem to pay the whole mortgage debt. In the other case, the Court laid down that a mortgagee's right to realise his debt by sale of any portion of the land mortgaged to him cannot be curtailed by the fact that the portion of the land he elects to sell has been sold by the mortgagor subsequent to the date of the mortgage. *Lala Dilawar Sahai v. Dewan Bolakiram*(2) is to the same effect; and it was there held that where the owner of certain property mortgages it to A and afterwards sells a portion of the mortgaged property to B, it

(1) I.L.R., 5 Mad., 385.

(2) I.L.R., 11 Cal., 258.

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is not incumbent on A in suing to enforce his mortgage to proceed first against that portion of the mortgaged property which has not been sold by the mortgagor. *Roghu Nath Pershad v. Harlal Sadhu*(1) proceeds on the same principle, and the contention of the purchasers of the equity of redemption from the mortgagors that the debt should be apportioned upon the portions held by each of them, was disallowed, it being pointed out that the mortgagee was entitled to realise the whole debt upon the whole property, the right to contribution being only as between the defendants (*Bhikhari Das v. Dulip Singh*(2)) is a similar decision. Dr. Rash Behari Ghose apparently considers that *Lala Dilawar Sahai v. Dewan Bolakiram*(3) and *Rama Raju v. Subbarayudu*(4) and the cases following them go too far. We should be disposed not to rely on the authority of the said decisions when the mortgagee refrains from proceeding against the portion of the mortgaged property which the mortgagor has not parted with, and when he seeks to realise the entire debt from those portions only of the mortgaged property which have been conveyed by the mortgagor, subsequent to the mortgage to a purchaser without any contract affecting the purchaser's right to have the charge satisfied out of the portion retained by the mortgagor, in other words where the mortgagor conveys not merely the equity of redemption but the property itself free from any liability to contribute to the mortgage debt. That, in such a case, the purchaser may insist upon the mortgagee proceeding in the first instance against the mortgaged property which is in the mortgagor's hands would seem to be consonant alike with sound principle and the weight of authority (Ghose on 'Mortgage,' 3rd edition, p. 436). The present, of course, is altogether a different case: not only are the appellants not purchasers of the property free from the mortgage, but the one-third not proceeded against does not belong to and is not in the hands of the mortgagor, but is the property of a third party who is sought to be affected by a transaction entered into, so far as he is concerned, by another, purporting to act under the power incident to the position of the mortgagor of a joint family under the Hindu Law. The doctrine of marshalling on the principle of which the appellant's contention

(1) I.L.R., 18 Calo., 320.

(3) I.L.R., 11 Calo., 258.

(2) I.L.R., 17 All., 434.

(4) I.L.R., 5 Mad., 387.

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virtually rests is not applicable to such a case. Even in the cases to which that doctrine in all its strictness is applicable Dr. Ghose points out "but there can be no doubt that, as a rule, marshalling cannot be enforced against the prior mortgagee where there is any doubt of the sufficiency of the fund upon which the junior creditor has no claim; or where the prior creditor is not willing to run the risk of obtaining satisfaction out of that fund, or where that fund is of a dubious character or is one which may involve him in litigation to realise, Jones section 1628" (Ghose on 'Mortgage' at p. 874).

Even if the facts of the present case were such as otherwise to admit of the application of the doctrine of marshalling, the existence of the dispute as to the liability of the nephew's share would take the case out of it. *Flint v. Howard*(1) on which Mr. Krishnasami Aiyar laid stress has no real bearing upon the present question. The decision was with reference to the special terms of the contract between the parties. In *Ram Dhum Dhur v. Mohesh Chunder Choudhry*(2), no doubt, the mortgagee was compelled to resort in the first instance to properties not parted with by the mortgagor. There, however, the question was in execution of a decree and it was quite competent to the Court to exercise the control, which it did so as to bring the different items of property comprised in the decree to sale in a particular order with a view properly to adjust the equities possessed by the parties who were before it and who were all the parties interested in the different items constituting the security. It was urged by Mr. Krishnaswami Aiyar that the frame of the present suit was in contravention of the rule in section 85 of the Transfer of Property Act and that, with reference to that section, the Subordinate Judge should have ordered the plaintiff's nephew entitled to the third share not comprised in the suit to be made a party, and allowed the appellants to raise the issue as to whether the mortgage was not binding upon that one-third share also, and, in the event of the finding being in their favour, given directions in the decree which would have the effect of distributing the mortgage debt proportionately. The literal construction of section 85 pressed by Mr. Krishnaswami Aiyar cannot but lead to startling results. Suppose, for instance, some part of the property comprised in a mortgage is

(1) (1898) 2 Ch. D., 54.

(2) I.L.R., 9 Calo., 406.

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made the subject of litigation between, on the one hand, a party denying the mortgagor's title thereto and on the other the mortgagor and the mortgagee and the mortgagor's title is finally negatived, it would be necessary to make such third person a party to the suit brought by the mortgagee against the mortgagor, if the words of section 85 are to be taken literally, inasmuch as the previous adjudication would not render the property adjudicated upon any the less "property comprised in the mortgage," section 85, as has been pointed out more than once but reproduces a rule as to parties which had of course been even previous to the Transfer of Property Act held applicable to mortgage suits, viz., that all persons interested in the actual subject of the suit should be before the Court in order that as far as possible as between them complete justice might be done. That rule was never understood as authorizing the Court to complicate a suit by a mortgagee by introducing into it controversy in which the mortgagee upon the frame of his plaint in itself unobjectionable, is really uninterested. Now the consequence of allowing Mr. Krishnaswami Aiyar's contention under consideration would, at least, be to oblige the plaintiff to await the result of this controversy in all its stages between the appellants on the one hand and the nephew interested in the one-third on the other for the realisation of his debt from so much of the property as is unquestionably liable for it and against which alone he wishes to proceed and as shown above is entitled to proceed. In these circumstances to make the recovery of the plaintiff's debt to any extent dependent upon the settlement of the dispute between the appellants and the nephew would be to give the mortgagee's suit a turn to which he has a right to object.

It remains only to observe that, if the action of the mortgagee had had the effect of extinguishing the mortgage lien upon any portion of the mortgaged property so as to relieve it from the liability to bear its proportion of the debt, he cannot recover more than what the property he proceeds against would be rateably liable for. Such is not the case, for the omissions of the plaintiff to include the nephew's share did not affect the liability thereof to bear its proportion of the debt. In the event of the appellants being obliged to pay the whole debt and being able to show that the nephew's share was also liable, they would be entitled to contribution from him notwithstanding the non-inclusion of his

third share in the present suit (*Jagat Narain v. Qutub Husain*(1) and *Chagandas v. Gansing*(2)). And, so long as the equities in the matter of contribution as between these parties are thus unaffected by the act of the plaintiff, the latter's right to be paid the whole of his debt from whatever portion of the mortgaged properties he wishes to comprise in his suit cannot be questioned.

The decision of the Subordinate Judge is therefore right and the appeal is dismissed with costs.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

KOYYANA CHITTEMMA AND ANOTHER (DEFENDANTS
Nos. 2 AND 3), APPELLANTS,

v.

DOOSY GAVARAMMA AND OTHERS (PLAINTIFFS Nos. 1 AND 2,
FOURTH DEFENDANT, LEGAL REPRESENTATIVES OF THE DECEASED,
FIRST RESPONDENT), RESPONDENTS.*

Civil Procedure Code Act XIV of 1882, ss. 13, 283—Order 'in investigation' under Section 283, what is—Payment of decrees amount more than one year after order, effect of—Decision on question of mixed law and fact res judicata—Voluntary payments not recoverable.

A claim to attached property by A was dismissed by the following order:—
"The sale seems collusive. Claim rejected." The order was apparently made on a consideration of the sale deed alone and there was nothing to show that any evidence was gone into. More than a year after the order B, claiming the properties under a sale by A subsequent to the order, paid the decree amount and the attachment was raised. In a suit by A to redeem the lands on the strength of his title under the sale dealt with by the order:

Held, that as the order on the claim by A, purported to be made on the merits, it was valid as one made after an 'investigation' of the claim within the meaning of the word as used in the Code.

Held further, that the order was conclusive between A and the defendants and that the payment of the decree debt by B, having been made more than a

(1) I.L.R., 2 All., 807.

(2) I.L.R., 20 Bom., 615.

* Second Appeal No. 1003 of 1903, presented against the decree of E. B. Elwin, Esq., District Judge of Ganjam, in Appeal Suit No. 199 of 1902, presented against the decree of M.R.Ry. P. Lakshmenaraju, District Munsif of Chicacole, in Original Suit No. 45 of 1901.

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GAVARAMMA. year after the date of the order did not relieve A from the obligation to bring a suit within a year to set aside the order.

A judgment in a previous suit between the same parties not based on a misapprehension as to a general rule of law but deciding a question of mixed law and fact is binding as *res judicata* in a subsequent suit.

Sardhari Lal v. Ambika Pershad, (I.L.R., 15 Calc., 521), followed.

Umesh Chunder Roy v. Raj Bullubh Sen, (I.L.R., 8 Calc., 279), distinguished.

Krishna Prosad Roy v. Bipin Behary Roy, (I.L.R., 31 Calc., 228), distinguished.

Gopal Purshotam v. Bai Divali, (I.L.R., 18 Bom., 241), distinguished.

Parthasaradi v. Chinna Krishna, (I.L.R., 5 Mad., 304, at p. 309), distinguished.

THE facts necessary for this report are fully set out in the judgment.

P. R. Sundara Ayyar and *R. Kuppuswami Ayyar* for *V. Ramesam* for appellants.

K. Srinivasa Ayyangar for *V. Krishnasawmi Ayyar* for second and fourth respondents.

K. S. Ramaswami Sastry for *S. Gopalasawmi Ayyangar* for third respondent.

P. Nagabhushanam for sixth and seventh respondents.

JUDGMENT.—For the purposes of the questions we have to consider in this appeal, the material facts are as follow:—

In July 1890 the father of the plaintiffs mortgaged certain lands to certain parties whose interest is now vested in the defendants. In July 1895 the father executed and registered a sale deed by which he purported to sell the lands in question to the plaintiffs, the lands being in possession of the defendants under the mortgage of July 1890. In Original Suit No. 407 of 1895, a suit against the father, the lands were attached. The plaintiffs preferred a claim to the attached property. This claim was rejected by an order dated the 22nd February 1896 made under section 283 of the Code of Civil Procedure. In July 1898 the father purported to sell the lands to the defendants. In October 1898 when the property was put up for sale in execution of the decree in Original Suit No. 407 of 1895, the late first defendant paid off the amount due under the decree and the attachment was raised.

The present suit is a suit by the plaintiffs to redeem the lands in question.

The Court of First Instance held that the plaintiff's claim was barred by article 11 of the second schedule to the Limitation Act, the plaintiffs not having brought a suit to establish their right to the property in dispute within one year from the date of the order made under section 283 of the Code of Civil Procedure. The Lower Appellate Court was of opinion that the claim was not

barred inasmuch as there had been no "investigation" of the plaintiff's claim within the meaning of that word as used in the Code. We do not think the judgment of the Lower Appellate Court can be supported upon the ground that there has been no "investigation" of the plaintiff's claim. The actual order was "The sale seems to be collusive. Claim rejected." The District Judge observes: "The sale in question was one by a father to his daughters and the Munsif may have thought from a glance at the sale deed that it was probably collusive."

Assuming this to have been so, we think it must be taken that there was an "investigation" within the meaning of this word used in the sections.

It is not possible to define the amount of inquiry which constitutes an "investigation." If the order purports to deal with the claim on the merits, we think it must be taken that there has been an investigation.

In the case of *Sardhari Lal v. Ambika Pershad*(1) the Privy Council observe: ". . . The Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows to him."

In the case of *Munisami Reddi v. Arunachala Reddi*(2) in which the Court held there has been no investigation and consequently no order within the meaning of the section, the claim was "practically withdrawn." In the case of *Pullamma v. Pradosham*(3) the order was "there is nothing to show that the petitioner's land have been attached," and it was held there was no order within the meaning of the section. In that case the Court held, in effect, that there was no occasion to investigate since there was nothing to show the lands had been attached. There does not appear to be any case in which an order which purports to be an adjudication on the merits of the case has been held to be not an order made after investigation within the meaning of the section.

(1) I.L.R., 15 Calc., 521.

(2) I.L.R., 18 Mad., 265.

(3) I.L.R., 18 Mad., 316.

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It was argued on behalf of the respondents that the decree of the Lower Appellate Court could be upheld upon the ground that the property not having been sold in execution of the decree, and the decree having been satisfied, the order was not conclusive as between the plaintiffs and the defendants. The argument was that the decree having been eventually satisfied there was no reason for the plaintiffs to bring a suit, and the fact that it was not satisfied until after the expiration of a year from the date of the order was immaterial. The contention was that the order was only conclusive against the plaintiffs, if they failed to bring a suit so as to bar them from denying the right of the judgment-creditor to sell the land which he had attached and the right of a purchaser claiming under a sale in execution proceedings. The respondents relied on the observation in the judgment in the case of *Umesh Chunder Roy v. Raj Bullabh Sen*(1) observation is as follows:—

“The finding of the Court in the execution department that the sale was invalid, only meant that the sale was invalid as against the judgment-creditor, and as against any purchaser who might purchase at a sale held in execution following that attachment. When the judgment creditor was paid off, he had no further claim.”

This observation must, of course, be read by the light of the facts of the case with which the learned Judges were dealing *secundum subjectam materiam*. The facts in that case are distinguishable from those in the present case first, on the ground that in the Calcutta case the decree amount was paid off by the judgment-debtor in the suit in which the decree was obtained and not, as in the case before us, by a third party to whom the lands were subsequently conveyed. Further there is nothing to show that in the Calcutta case the payment off was not made within a year from the date of the order dismissing the claim.

Our attention was called to other cases where an order under section 283 of the Code of Civil Procedure dismissing a claim has been held to be not conclusive against the claimant. It seems to us that all these cases are distinguishable.

In the case of *Krishna Prosad Roy v. Bipin Behary Roy*(2) certain lands of which the plaintiff was in possession were attached under a decree. He preferred a claim in the execution proceedings

(1) I.L.R., 8 Calc., 279.

(2) I.L.R., 81 Calc., 228.

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under section 278 and the claim was dismissed by an order under section 283 of the Code of Civil Procedure. He at once paid off the decree amount and the attachment was raised. It was held that when the attachment was removed after the payment of the decretal amount there was no longer any attachment or proceeding in execution in which the order could operate to the prejudice of the plaintiff, and therefore there was no necessity for him to bring a suit to set aside the order. In that case the plaintiff by his own act, within a year from the making of the order, got the attachment removed. This being so, he could not be held to be under any obligation to bring a suit to secure the object which he had already secured by paying off the amount of the decree. The principle of that decision is not applicable to the present case. In the case of *Ibrahimhai v. Kabulabhai*(1) the amount of the decree was paid off by the judgment-debtor. In the case of *Gopal Purushottam v. Bai Divali*(2) the attachment was removed by the act of the judgment-creditor who was the plaintiff in the suit. Having removed the attachment by his own act, he could not be heard to say as against the claimant—(the defendant in the suit)—because you did not bring a suit when your claim was dismissed you are concluded from setting up a title as against me.

In the three cases just referred to, it is clear that the decree amount was paid off within a year from the making of the order under section 283 of the Code of Civil Procedure. In the first case *Umesh Chunder Roy v. Raj Bullabh Sen*(3) the report does not state when the decree amount was paid off, though there is nothing to suggest it was paid off more than a year after the making of the order. In all the cases the decree was paid off by a party to the execution proceedings—not as in the case before us, by a third party. It is not necessary for us to decide whether the fact of the money having been paid off by a third party, would be a good ground for distinguishing the present case from the cases to which we have referred. We are of opinion, however, that the payment off not having been made within a year after the date of the order, the order is conclusive as between the claimants (the plaintiffs) and the defendants. To hold otherwise would lead to uncertainty of title and would be inconsistent with

(1) I.L.R., 13 Bom., 72.

(2) I.L.R., 18 Bom., 241.

(3) I.L.R., 8 Calc., 279.

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the policy of the legislature in prescribing a short period of limitation for suits by parties against whom an order has been made in claim proceedings. To hold that the right of an unsuccessful claimant to bring a suit remains in a state of suspended animation for an indefinite period after the expiration of a year from the date of the order against him liable to be revived at any moment by the payment off of the amount of the decree, would lead to great inconvenience. On the facts of the case we are of opinion that the order under section 283 was conclusive as between the plaintiffs and the defendants, and the order of the lower Appellate Court cannot be supported on the ground that it was not.

There remains the question of *res judicata*. If the plaintiffs' claim in the present suit is *res judicata* we are of course precluded from giving effect to the view indicated above and we must dismiss the appeal. The respondents (plaintiffs) say that their claim in the present suit is *res judicata* by reason of the decree in Original Suit No. 39 of 1899. As regards this question, the view of the District Judge was that the claim in the present suit was *res judicata* in the plaintiffs' favour but he did not discuss the question at any length as it was unnecessary for him to go into it since he allowed the appeal on other grounds. The parties to Original Suit No. 39 of 1899 were the present plaintiffs and the present first and second defendants. The first defendant is dead. The present third defendant is the adopted son and the present fourth defendant is a party who claims as alienee from the third defendant. For the purpose of the question of *res judicata* we are of opinion that the parties are the same. In Original Suit No. 39 of 1899 the plaintiffs obtained a decree for redemption of plaintiff items Nos. 1 and 2 in that suit. As regards items Nos. 3 to 5 in that suit, the suit was dismissed on the ground that on the construction of the mortgage deed the plaintiffs were not entitled to redeem these lands before the 18th July 1900. Items Nos. 3 to 5 in the suit of 1899 are the items which the plaintiffs seek to redeem in the present case. The appellants contend that the decree in Original Suit No. 39 of 1899 does not operate as *res judicata* since it is an erroneous decision on a point of law, they rely on the judgment of this Court in the case of *Parthasaradi v. Chinna Krishna*(1). It seems to us that that case may be

(1) I.L.R., 5 Mad., 304 at p. 309.

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distinguished on the ground that the parties were not the same in the two suits; but, however this may be, the judgment in that case appears to have been proceeded on the ground that the decree relied on as *res judicata* was based on a misapprehension as to a general rule of law.

In giving the plaintiffs a decree in Original Suit No. 39 of 1899 as regards items Nos. 1 and 2 of the lands in question we do not think it can be said that the District Munsif was under any misapprehension as to any general rule of law applicable to the case. The question he had to determine was a question of mixed law and fact (as in the case of *Priya Choudhurani v. Bhaba Sundari Debi*(1)). The question was, on the facts, whether there had been an "investigation" within the meaning of the word as used in section 283 of the Code of Civil Procedure. He was of opinion that there had not been and because he was of this opinion he gave a decree for the plaintiffs. The investigation was with reference to the lands amongst others which the plaintiffs seek to redeem in the present suit. We are of opinion that the question of the plaintiffs' right to redeem the lands which they seek to redeem in the present suit is *res judicata* by reason of the decree in Original Suit No. 39 of 1899.

The appellants have contended that if the respondents are entitled to redeem the lands in question they can only do so on payment, in addition to the amount due under the mortgage, of a sum of Rs. 187-15-7. This was a sum paid by the appellants (defendants) in order to raise the attachment in Original Suit No. 407 of 1895. This payment was made by the defendants after the alleged sale to them and it was made for the purpose of clearing their title under the sale deed to them. It was a voluntary payment and was not made on behalf of or for the benefit of the plaintiffs. We are of opinion that the plaintiffs cannot be called upon to pay this amount in their suit to redeem. We dismiss the appeal but without costs.

(1) I.L.R., 28 Cal., 318.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

1905.
November 21.

MOTHIAR MIRA TARAGAN (PLAINTIFF), APPELLANT,

v.

AHMATTI AHMED PILLAI (DEFENDANT), RESPONDENT.*

Transfer of Property Act IV of 1882, s. 83—Money deposited under, becomes property of mortgagee only when conditions stated in section complied with.

Money deposited in Court by the mortgagor for payment to the mortgagee under section 83 of the Transfer of Property Act does not become the property of the latter until he has complied with the conditions prescribed by the section as conditions precedent to his drawing the money out of Court.

Dal Singh v. Pitam Singh, (I.L.R., 25 All., 179), followed.

THE facts necessary for this report are set out in the judgment of Sankaran Nair, J., which is as follows:—

In this case a mortgagor deposited under section 83 of the Transfer of Property Act the amount remaining due on the mortgage.

Under that section such payment is to the account of the mortgagee, and under section 84, the mortgagor is not liable to pay interest from the date of the tender.

The amount in Court must, therefore, be treated as the mortgage money payable to the mortgagee, and as the defendant was a judgment-creditor of the mortgagee, he is entitled to be paid his judgment debt out of that amount on proper steps being taken by him.

It is argued before me that the amount deposited in Court does not belong to the mortgagee as he has not presented a proper petition or received the money. In my opinion this makes no difference as it is open to the mortgagee to make the proper application and receive the money under section 83 any time after the deposit, and the fact that interest ceases under section 84 makes the tender equivalent to payment so far as the mortgagor is concerned. It is also urged that the mortgagor's petition was dismissed by the order passed on the 28th July 1903.

* Appeal No. 34 of 1903, presented under section 15 of the Letters Patent against the judgment of Mr. Justice Sankaran Nair in Civil Revision Petition No. 478 of 1904, presented against the decree of the Subordinate Judge of Tinnevely in Small Cause Suit No. 67 of 1904.

Assuming that the petition therein referred to is the petition presented by the mortgagor, the amount in Court still continues to be the mortgagee's property so long as it is there to the account of the mortgagee.

The decree of the lower Court is, therefore, right and this petition is dismissed with costs.

Plaintiff preferred this appeal under the Letters Patent.

P. C. Seshachariar for appellant.

Mohamed Ibrahim Sahib for respondent.

JUDGMENT.—We think that the learned Judge is in error in holding that the money deposited in Court by the mortgagor for payment to the mortgagee under section 83 of the Transfer of Property Act was the property of the mortgagee and liable to be attached by a creditor of the latter, even though the mortgagee had not complied with the conditions prescribed by that section as conditions precedent to his drawing the money out of Court. Those conditions are that, he should put in a verified petition stating his willingness to accept the money, so deposited, in full discharge of the amount due under the mortgage, and should deposit the mortgage deed in Court.

The case of *Dal Singh v. Pitam Singh*(1) is exactly in point, and we agree with the observation of the learned Judges in that case that to hold otherwise might lead to great injustice, as it, in fact, has done in the present case.

We set aside the order of the learned Judge with costs. We also set aside the decree of the Subordinate Judge and give judgment for the plaintiff for the amount sued for with costs throughout.

(1) I.L.R., 25 All., 179.

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PILLAI.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

MYLAN (RESPONDENT—PLAINTIFF), APPELLANT,

v.

ANNAVI MADAN AND ANOTHER (PETITIONERS—DEFENDANTS),
RESPONDENTS.*

1905.
October 30,
31.
November 13.

Limitation Act XV of 1877, s. 20—Payment of interest as such—Payment must be of such a nature as to be a good defence to an action for the amount.

Where the payee of a promissory note, was put in possession of certain lands under an agreement that he was to take the produce of the land as interest, such receipt of produce will be a payment of interest as such sufficient to satisfy the requirements of section 20 of the Limitation Act, as it will be a good defence to an action by the payee for the interest.

The payment contemplated by section 20 need not necessarily be in money but must be of such a nature as to be a good defence to an action for the amount due.

Kollipara Pullamma v. Maddula Tatayya, (I.L.R., 19 Mad., 340), followed.

Kariyappa v. Rachapa, (I.L.R., 24 Bom., 493), referred to.

SUIT to recover the amount due on a promissory note executed in favour of the plaintiff on the 8th July 1897. The suit was instituted in 1903.

The Subordinate Judge held that the suit was not barred, as the plaintiff by virtue of an agreement with the defendant was enjoying the produce of certain lands in lieu of interest. He accordingly passed a decree in favour of the plaintiff.

On revision, his decree was set aside by Davies, J., who passed the following order :—

“The promissory note in this case provided for the payment of interest in money. Enjoyment of property cannot be construed into the payment of interest in money in the case of a promissory note so as to save the bar of limitation within the meaning of the section 20 of the Limitation Act. The Subordinate Judge does not attempt to say that it does. The suit on the promissory note is clearly barred by limitation, no interest having been paid

* Appeal No. 28 of 1905, presented under section 15 of the Letters Patent against the order of Mr. Justice Davies in Civil Revision Petition No. 148 of 1904, presented against the decree of M.R.Ry. B. Cammaran Nair, Subordinate Judge of Tuticorin, in Small Cause Suit No. 892 of 1903.

under it since its execution, so as to give the plaintiff a new period of limitation.

The petition is allowed and the plaintiff's suit dismissed with costs throughout.”

Plaintiff preferred this appeal under clause 15 of the Letters Patent.

T. V. Muthukrishna Ayyar for appellant.

T. R. Venkatarama Sastri for respondents.

JUDGMENT.—The decision of the learned Judge cannot in our opinion be upheld. The Subordinate Judge has found that the defendants put the plaintiff in possession of certain land, a month after the execution of the promissory note of the 8th July 1897 and that the plaintiff and the defendants agreed that the plaintiff was to take possession of this land as interest on the amount due to him under the promissory note. Under this agreement the plaintiff remained in possession of the land and enjoyed the produce as interest up till August 1902. The facts being as we have stated, we are of opinion that there was a payment of interest, as such, sufficient to satisfy the requirements of section 20 of the Indian Limitation Act. Such a payment need not be in money. We follow the view taken by this Court in the case of *Kollipara Pullamma v. Maddula Tatayya*(1) where it was held, referring to the decisions in *Amos v. Smith*(2), *Maber v. Maber*(3) and *Hart v. Nash*(4) as follows: “The broad rule deducible from those cases seems to be that, though the payment need not be in money, but may be in goods, or even by a settlement of account between the parties, yet the payment must be of such a nature that it would be an answer in a suit brought by the plaintiff to recover the amount.” Reference may also be made to the case of *Kariyappa v. Rachapa*(5) where the same rule is adopted, and it is laid down that the test to be applied is whether the payment that has been made is of such a nature that it would be a complete answer to a suit brought by the creditor to recover the amount. Applying this rule to the present case it must be held that the requirements of section 20 of the Indian Limitation Act have been satisfied. The defendants and the plaintiff having entered into an agreement under which the plaintiff was to take

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(1) I.L.R., 19 Mad., 340 at p. 342.

(3) L.R., 2 Ex., 153.

(5) I.L.R., 24 Bom., 493.

(2) 1 H. & C., 238.

(4) 2 C.M. & R., 337.

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the produce of the land as interest on the principal amount due under the promissory note, the plaintiff could not have succeeded if he had subsequent to that agreement sued to recover such interest from the defendants. This is, in our opinion, the test that should be applied. Reference may also be made to the case of *Ragho Shitaram v. Hari*(1). We allow this appeal, reverse the decision of the learned Judge, and restore that of the Subordinate Judge with costs in this Court and before the learned Judge on revision.

APPELLATE CRIMINAL.

Before Mr. Justice Sankaran Nair.

1905.
September 8.

RANGACHARLU AND ANOTHER (ACCUSED), PETITIONERS,

v.

EMPEROR.*

Criminal Procedure Code—Act V of 1898, s. 421—Summary rejection of appeal.

Where a petition of appeal signed by a pleader is presented to a Magistrate by the party in person, the appeal cannot be dismissed without giving the pleader a reasonable opportunity to appear.

Where the conviction is based on the evidence of witnesses whose credibility is impeached by the accused on reasonable grounds, the appeal should not be summarily rejected under section 421 of the Code of Criminal Procedure without sending for the records.

The facts necessary for this report are set out in the judgment.

Dr. *Swaminadhan* for petitioners.

The Public Prosecutor (Mr. *E. B. Powell*) opposed the petition.

JUDGMENT.—The memorandum of appeal to the lower Court is signed by a pleader; it was presented to the Magistrate who was in camp, by the appellant in person, on the 13th December 1904 and was summarily rejected at once without giving a reasonable opportunity to the pleader to appear.

(1) I.L.R., 24 Bom., 619.

* Criminal Revision Case No. 105 of 1905, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of C. A. Souter, Esq., First-class Magistrate in charge of Masulipatam Sub-division, in Criminal Appeal No. 117 of 1904, presented against the judgment of M.R., B. Ramachandra Row, Second-class Magistrate of Masulipatam, in Calendar Case No. 649 of 1904.

The Magistrate was wrong in thus rejecting the memorandum. Nor does the case appear to be one in which the appeal ought to have been summarily rejected without sending for the records. The conviction is based on the evidence of witnesses who are no longer members of the company and are alleged by the accused to have been dismissed by them. Their evidence ought to have been read by the Magistrate or he should have heard the pleader before dismissing the appeal.

I accordingly set aside the order of the Magistrate, under section 421 of the Criminal Procedure Code, direct the First-class Magistrate of Masulipatam Sub-division to restore the case to his file and dispose of it according to law.

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APPELLATE CRIMINAL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice.

KADER BATCHA AND OTHERS (FIRST PARTY), PETITIONERS,

v.

KADER BATCHA ROWTHAN AND OTHERS (SECOND PARTY), COUNTER-PETITIONERS.*

Criminal Procedure Code Act V of 1898, s. 147—Dispute as to right to use a mosque within the section—Charter Act, s. 15.

An order under section 147 of the Code of Criminal Procedure, declaring possession to be with a certain person is illegal when there has been no enquiry as to the party in possession and will be set aside under section 15 of the Charter Act.

A dispute as to the right to use a mosque between persons claiming to be entitled to officiate as Kazi therein is a dispute coming within section 147 of the Code of Criminal Procedure.

The Second-class Magistrate of Tiruppattur, acting on certain petitions presented to him by persons interested in the mosque at Tiruppattur, and on a police report and being satisfied that a breach of the peace was likely to occur from the attempts made by one Peria Sevvai to introduce two other persons to officiate for him as

1905.
October 17.

* Criminal Miscellaneous Petition No. 87 of 1905, presented under section 15 of the Charter Act, praying the High Court to set aside the order of C. G. Mackay, Esq., Sub-Divisional Magistrate of Ramnad, in Miscellaneous Case No. 43 of 1904.

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Kazi in the mosque, referred the matter to the Sub-Divisional Magistrate of Ramnad. The Sub-Divisional Magistrate issued notice under section 147 of the Code of Criminal Procedure, to the parties to appear and file written statements and produce evidence as to their respective claims to the right of appointing persons to officiate in the mosque. The parties accordingly filed statements and adduced evidence but there was no inquiry as to who was in possession of the mosque. The Sub-Divisional Magistrate passed orders, the operative portion of which was as follows:—

"I find for the counter-petitioners' party declaring the mosque to be in their possession and direct the petitioners to cease from a course which is likely to engender strife until they have established their claim as indicated above."

The petitioners preferred this criminal miscellaneous petition. *K. N. Ayya* for petitioners.

Messrs. *Mohamed Ibrahim Sahib* and *Mohamed Ismail Sahib* for counter-petitioners Nos. 2 to 5.

ORDER.—No doubt there was no enquiry in this case as to who was in possession of the mosque. The order therefore in so far as it declares possession to be with the second party cannot be maintained and the vakil who represents that party concedes this. As to the real point in question it is clear that a dispute as to a right to use a mosque by persons claiming to be entitled to officiate as Kazis therein is a dispute coming within section 147 of the Code of Criminal Procedure and *Muhammad Musaliar v. Kunji Chek Musaliar*(1), so far as it goes confirms the above view. The order will therefore be modified by directing that Ibrahim and Kather Ibrahim shall not be introduced into the mosque to officiate therein, by the five individuals mentioned in the Magistrate's order as forming party No. I. until the decision of a competent Civil Court recognizing the alleged right is obtained by them.

(1) I.L.R., 11 Mad., 323.

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, and Mr. Justice
S. Subrahmanya Ayyar.*

SRINIVASA MOORTHY OTHERWISE CALLED SHAMANNA
(DEFENDANT), APPELLANT,

v.

VENKATA VARADA AYYANGAR alias SHAMANNA
AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Letters Patent, cl. 12—Jurisdiction over foreigner present or absent when suit instituted—What amounts to dwelling within the jurisdiction—In administration suit undertaking to administer forms part of cause of action—Estoppel against executor taking probate and realising assets—Administration may be ordered of immoveable property outside jurisdiction.

Suit on the original side of the High Court by three executors and trustees of the will of A against A's son, the fourth executor, and trustee, praying for his removal and for the administration of the estate by the Court. The executors had obtained probate of the will from the High Court limited to the assets in the Presidency, and the assets realized by virtue of this grant had come into the hands of the defendant who subsequently repudiated the will and claimed to take the estate of the deceased by survivorship. Some months before the institution of this suit the defendant who was domiciled in the Mysore State had left his house in Mysore in charge of a peon, and had brought his wife and child to Madras and taken a house there, and apprenticed himself for one year to a Vakil of the High Court with a view to becoming enrolled as a Vakil. He was present in Madras on 30th of August 1901, when the plaint was filed, but left on

* Original Side Appeal No. 47 of 1904, presented against the preliminary judgment and order of Mr. Justice Moore in Civil Suit No. 143 of 1901.

FOOTNOTE (JUDGMENT IN ORIGINAL SIDE APPEAL No. 6 of 1900).—Sir ARNOLD WHITE, C.J.—This is an appeal against a judgment of Shephard, J., dismissing as against all the defendants the plaintiff's suit. The defendants were sued as the executors with the probate of the will of one-Srirungapatnam Venkatavarada Aiyangar. The plaintiff is the daughter and the first defendant is the only son of the testator. The will contains the following provisions:—

"Moreover as soon as this will shall come into force out of the sum forming four-fifth part of the amount which may be derived from the policies insured in my own name and assigned for convenience in favour of my son and which are in force, Government of India promissory notes shall be purchased and kept for and on account of my daughter Sowbhagiavathi Venkata Lutchmammal and the interest derived therefrom shall be paid to the aforesaid Venkata Lutchmammal for her life and thereafter the whole of the amount of the aforesaid promissory notes shall go to her children equally without distinction of male or female but in case any of her children shall not have then attained

1905.
November
14, 17, 20, 22.
1906.
January 11.

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the following day before the summons was served. Moore, J., directed the defendant to be removed, and passed a preliminary order for the general administration of the estate :

Held, on appeal, that the High Court had jurisdiction under clause 12 of the Letters Patent to try the suit.

Per ARNOLD WHITE, C.J.—The jurisdiction conferred by clause 12 of the Letters Patent where the cause of action arises wholly, or in part, within Madras extends to suits against absent foreigners: Further, in this case, the presence of the defendant within the jurisdiction when the suit was instituted, that is, when the plaint was filed, would give jurisdiction. Observations as to the jurisdiction of the old Supreme Court now vested in the High Court.

Per SUBRAHMANYA AYYAR, J.—The presence of the defendant in Madras when the suit was instituted by filing the plaint placed him in the position of an ordinary subject of His Majesty with regard to jurisdiction. Even if the defendant had been absent when the suit was instituted, there would be nothing contrary to international law in holding that the jurisdiction conferred by clause 12 when the cause of action arises wholly or in part with the jurisdiction applied to his case. According to the general principles of English jurisprudence temporary presence and the accrual of the cause of action within the limits of the Court would each by itself be a ground of jurisdiction; and in this case the cause of action which accrued in Madras by its very nature made the defendant liable to the authority of the Court.

Annamalai Chetty v. Murugasa Chetty, (I.L.R. 26 Mad., 544), *Girdhar Damodar v. Kassigar Hiragar*, (I.L.R., 17 Bom., 662), *Gurdial Singh v. Rajah of Faridkote*, (L.R., 21 I.A., 171), and *Tadipalli Subba Row v. Nawab Sayed Mir Gulam Ali Khan*, (I.L.R., 29 Mad., 69), considered and explained.

Per curiam.—In the circumstances set out above, the defendant was dwelling in Madras within the meaning of clause 12 of the Letters Patent (*Goswami Shri Ghordharaji v. Shri Govardhanlalji*, I.L.R., 18 Bom., 290, considered); further the undertaking to administer the estate given by the defendant at the time of the grant of probate was part of the cause of action arising within the jurisdiction within the meaning of the clause.

"fully the age of twenty-one years, their shares shall be withheld and the income thereof shall be paid to them for their education and other benefits and to such of them as shall have attained the age of twenty-one years shall be paid their respective shares as soon as they complete twenty-one years."

* * *
"Moreover as soon as this will shall come into force Government of India promissory notes for the remaining one-fifth of the insurance policy amount shall be separately purchased and kept and the interest thereof shall be paid to my wife as long as she may live and thereafter the aforesaid interest and the principal (i.e.) promissory notes shall go to my daughter Venkata Lutchammam and her children according to the conditions mentioned in paragraph 10 of this will. If on her death there be no children of hers in existence the whole of those promissory notes shall go to my son and after his death to his heirs. Only so none else have any right whatever thereto."

The testator died on August 24, 1892. On December 24, 1892, the executors took out probate of the will in the Court of the District Judge, Civil and Military Station, Bangalore, the approximate value of the assets in respect of which probate was granted being stated to be Rs. 6,500. On May 5, 1893, the

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The defendant having with full knowledge of his rights accepted the office of executor and taken probate of the will and under its authority collected assets and acted so as to cause third parties to alter their position was estopped from disputing the validity of the will on the dispositions and conditions contained therein.

The preliminary order for the general administration of the estate of the deceased was not open to objection on the ground that part of the immoveable property of the deceased was situated in Mysore. In compelling the defendant to perform the trusts of the will the Court is acting *in personam*, and when so acting has the same jurisdiction with regard to any contract made or equities between persons here as it has where the lands or assets are locally situate within the jurisdiction.

THE three plaintiffs (two of whom died after the institution of the suit), and the defendant, were the trustee-executors of the estate of the deceased father of the defendant.

The suit was instituted to remove the defendant from the office of trustee, to compel him to account for the assets of the deceased which had come to his hands, and to have the trusts of the will carried out.

The facts necessary for this report, and the history of the litigation are fully set out in the judgment of Subrahmanya Ayyar, J.

The first suit (Original Suit No. 76 of 1899) was instituted by the daughter of the deceased against all the four executors for the purpose of carrying out the trusts of the will in respect of the legacies provided for in clauses 10 and 12 of the will, and for the administration of the whole estate if necessary by the Court. No leave to institute the suit had been obtained and the first defendant

executors took out probate limited to the Presidency of Madras in the High Court of Judicature at Madras. The petition upon which the Madras probate was granted stated that there was property of the testator to be administered in the Presidency of Madras of the value of Rs. 1,00,000. The control and management of the estate was left by the other executors in the hands of the first defendant. On May 5, 1894, the first defendant filed in this Court, in the matter of the last will and testament of the testator, an inventory (R) showing assets realized in this Presidency between May 1893 and May 1894 to the amount of Rs. 65,000 odd. On the same date he filed an affidavit in this Court in which he stated "I have collected the several sums amounting nearly to rupees fifty thousand payable by the insurance companies on the life of my late father to me as duly registered assignee from the insured (testator) and for the present with the consent of the testator's only daughter and wife that is my sister and mother who are the present beneficiaries I have invested the whole sum of rupees fifty thousand or thereabouts in securities other than the Government of India promissory notes and have been paying them respectively the interest at 6 per cent. out of their respective legacies of Rs. 40,000 and Rs. 10,000 as devised by paragraphs 10 and 12 of the said will. This

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(the defendant in the present suit) was not then resident within the jurisdiction of the Court, while the defendants Nos. 2 and 4 were resident and the third defendant did not raise any objection to the jurisdiction. The suit was dismissed by Shephard, J., against all the defendants. On appeal (Original Side Appeal No. 6 of 1900) judgment was upheld as regards the first defendant, while as regards the other defendants the Court held that the suit was maintainable.

The present suit was instituted against the defendant by the three other executors (the three co-defendants in the prior suit), with leave to sue obtained under clause 12 of the Letters Patent.

The defendant pleaded, *inter alia*, that the Court had no jurisdiction; that the testator had no power to dispose of the property comprised therein by will as it was joint ancestral property, and that the Court had no jurisdiction to administer properties in foreign territory.

The learned Judge decided the points against the defendant and passed the following order:—

“The defendant must be removed from his trusteeship. I ascertained at the hearing that the plaintiff had no wish to continue as a trustee, he also must be removed and arrangements will have to be made by the Court for carrying out the terms of the trust. A preliminary order will be drawn up under section 213 of the Civil Procedure Code in the form prescribed (No. 130 in schedule IV appended to the Civil Procedure Code), and further orders will be

“arrangement I have made temporarily as all the executors have not yet met and discussed over the matter and I hope that this matter too will be settled in a manner consistent with the directions of the testator before July next.”

The policies referred to in clause 10 of the will as policies in the name of the testator assigned for convenience to his son (the first defendant) were a policy in the North British and Mercantile Insurance Company, Calcutta, for Rs. 20,000 and two policies in the Oriental Government Security Life Assurance Company, Bombay, for Rs. 20,000 and Rs. 10,000, respectively. As regards the Calcutta policy the executors on May 30, 1893, gave a written authority (CC) to the company to pay the policy moneys to the first defendant and take his receipt as a discharge. On June 19, 1893, the first defendant writing from Bangalore (exhibit 5) forwarded to the agents of the company in Madras the policy stamped and signed by the executors. In his letter he stated that the amount of the policy did not fall within the probate as it had been assigned to him and that he could have sued the company if they had refused to pay the amount to him. On July 3, 1893, a cheque in favour of the executors for Rs. 23,510 was forwarded by the company through their agents in Madras to the first defendant at Bangalore (AA). This sum plus a further sum of Rs. 3,500 (Rs. 23,000 in all)

passed, from time to time, in accordance with the provisions of section 213 and the High Court rules to be found in order XXVIII, so that a final decree may be passed with the least possible delay.” The preliminary order ran as follows:—

“1. That the plaintiff and the defendant be removed from their office as executors and trustees under the will of Srirangapatam Venkatavarada Iyengar, deceased;

2. That an account be taken of what was due by the deceased as trustee;

3. That an account be taken of the following:—

(a) The legacies and annuities given by the will of Srirangapatam Venkatavarada Iyengar, deceased.

(b) The funeral and testamentary expenses of the said deceased.

(c) The moveable property of the deceased come to the hands of the plaintiff, if any, or the defendant, or to the hands of any other person by his or their order or for his or their use.

4. That an enquiry be made as to what part (if any) of the moveable property of the deceased is outstanding and undisposed of.

5. That for the purposes of the said accounts and inquiry, the defendant do file his statement of account in Court on or before the 4th January 1905, and that all beneficiaries under the will do have leave to come and prove their claims and raise objections to the said account, and that the plaintiff do give them notice of this order.

appears to have been advanced by the first defendant to one K. Shamiengar on September 6, 1893 (F), the first defendant taking by way of security a mortgage on lands in Mysore. As regards the Bombay policies the policy moneys (Rs. 30,000) were paid over to the first defendant, apparently in his capacity as assignee of the policies, by cheques sent direct from Bombay to the first defendant at Bangalore in November 1892 and receipts for the moneys were signed by the first defendant at Bangalore on November 13, 1892. It would seem that out of this Rs. 30,000, Rs. 28,000 was advanced to certain parties at Bangalore on the security of mortgages in Mysore.

Up to January 1897 the first defendant made payments of income to the plaintiff.

On January 19, 1897, the plaintiff, who was then residing in Madras, wrote to the first defendant as follows:—

“CASTLE KERNAN, TRIPPLICANE,
“1927/97.

(F)

“MY DEAR SHAMANNA,

“I got your letter with the cheque for Rs. 453-14-7. I have already written to you that I won't accept interest at any less rate than 6 per cent. till the

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6. That for the purposes aforesaid the said beneficiaries do on or before the 1st day of February 1905 file in Court their objections to the said account.

7. That the defendant do on or before the 4th day of January 1905 pay into Court all sums of money which shall be shown by his account to have come to his hands or to the hands of any person by his order or to his use.

8. That in the event of the moveable property of the deceased being found insufficient for carrying out the objects of the suit, enquiries be made and accounts taken of the following:—

(a) What immoveable property the deceased was seized of or entitled to at the time of his death;

9. That the immoveable property of the deceased or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the objects of the suit be sold with the approbation of the Judge and the proceeds thereof be paid into Court; and

10. That this suit do stand adjourned to the 15th day of February 1905 before the Judge in Chambers."

The defendant preferred this appeal.

Sir V. Bhashyam Ayyangar, V. Krishnaswami Ayyar and T. Rangaramanujachariar for appellant.

The Advocate-General (Hon. Mr. J. P. Wallis), and Mr. D. Chamier for first respondent.

JUDGMENT—(Sir ARNOLD WHITE, C.J.).—The facts of this case are fully stated in the judgment of Moore, J., and in the

"trust money is invested in Government paper in the name of all the executors.
"Please send the balance Rs. 346-1-5 at once, then I will send you the receipt
"for the full amount Rs. 800, the interest for four months ending December
"1896.

"Yours affectionately,
(Signed) AMMAYYA."

On January 30, 1897, the first defendant writing from Bangalore replied to this letter as follows:—

(K)
"Registered for acknowledgment.

"145, SULTANPETA, BANGALORE CITY,
"30th January 1897.

"MY DEAR AMMAYYA,

"In reply to yours of the 27th instant I beg to state that you as legatee are
"only entitled to receive the interest given by the Government, when the
"amount is invested in the Government stock as directed in the will. It is
"immaterial to you in whose name the paper stands. I decline to send you the
"extra amount asked for on account of interest at 6 per cent. I need not say

judgment of my learned brother which I have had the advantage of reading. It is not necessary for me to repeat them.

The most important question argued in this appeal was the question of jurisdiction. It was argued by Sir V. Bhashyam Ayyangar, on behalf of the appellant, that the Court had no jurisdiction *in personam* over the defendant by reason of the fact that he was a foreigner. In considering this question I leave out of consideration for the moment the fact that the defendant was, on the day the suit was instituted, within the local limits of the jurisdiction of this Court, and I propose, first, to consider the question on the assumption that the facts were the same as they were in O.S. Appeal No. 6 of 1900 (footnote). I held in that case that, if the cause of action had arisen wholly in Madras, this Court would have jurisdiction over the defendant notwithstanding the fact that he was an absent foreigner. Sir V. Bhashyam Ayyangar's learned and elaborate argument has not led me to think that I was wrong in this view. I do not wish to repeat what I then said but I desire to add a few further observations. The question really resolves itself into what was the intention of the legislature in enacting article 12 of the Letters Patent. Questions of International Law and of the general principles of jurisprudence are only relevant in so far as they afford a guide for the construction of this particular enactment.

The general rule of course is *extra territorium jus dicenti non paretur leges extra territorium non obligant*; and the presumption is that the Legislature does not intend to exceed its jurisdiction.

"anything more at present except that the law is not in favour of your
"contention.

"Yours affectionately,
(Signed) S. SHAMANNA."

On August 18, 1898, the first defendant through his legal adviser sent an intimation (see exhibit M) to the plaintiff's legal adviser to the effect that the first defendant was in possession and enjoyment of his ancestral estate in his own right under the Hindu law and that the will of the first defendant's father being invalid the first defendant had no intention of conforming to his father's directions. On September 15, 1898, the first defendant filed an affidavit in this Court in the matter of the last will and testament of the testator and in the matter of an application made by two of the executors (defendants Nos. 3 and 4) to compel the first to file an account of the administration of the estate, in which he stated that his late father had no disposing power over any of the property mentioned in the will and that the will executed by him was invalid and inoperative under the Hindu Law. At the same time he filed an inventory (T) showing assets realized in this presidency since May 1894 to the amount of Rs. 66,000 odd.

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But it is only when the words of the enactment which create the jurisdiction leave room for doubt as to whether the Legislature or the sovereign authority intended to confer jurisdiction over foreigners that the occasion arises to consider the effect of the presumption or to apply the principles of International Law.

It seems to me that to give jurisdiction over an absent foreigner, where the cause of action against him arises within the local limits of the jurisdiction of the Court is a legitimate exercise of sovereign right. On the question of the construction of article 12 it must be borne in mind that the Letters Patent were issued under the powers conferred by the High Courts Act of 1861, an Act of the Imperial Parliament and the law of England may be looked to for the purpose of ascertaining the intention of the Legislature in enacting the article. The Common Law Procedure Act, 1852 (sections 18 and 19), gave the Common Law Courts jurisdiction over a defendant not present in England when either the cause of action arose in England or depended upon the breach of a contract made in England. The general rule is laid down by Professor Dicey in his 'Conflict of Laws' in these terms:—"When the defendant in an action *in personam* is, at the time for the service of the writ, not in England, the Court has (subject to the exceptions hereinafter mentioned) no jurisdiction to entertain the action" (see rule 46, Dicey's 'Conflict of Laws,' p. 237). The exceptions are the cases provided for by R.S.C.O. XI and Ord. XLVIII-A., p. 238. Professor Dicey observes that "the rule and the exceptions, taken together, constitute, what has hitherto hardly existed, a body

The plaintiff in her suit asked for judgment as against all the defendants that the trusts of the will in respect of the legacies provided for in clauses 10 and 12 should be carried into effect, and that if the Court should deem it necessary or expedient the whole estate of the testator should be administered, that the proceeds of the policies should be paid into Court and the income of $\frac{1}{4}$ thereof be ordered to be paid to the plaintiff for life and that the right of the plaintiff to receive the rest of the income thereof after the lifetime of her mother should be declared, that an account should be taken of the income derived or which but for the negligence of the defendants, might have been derived from the proceeds of the policies and that the said defendants be ordered to pay $\frac{1}{4}$ thereof to the plaintiff.

In the plaintiff defendants Nos. 1, 2 and 4 are described as residing at Mylapore (a place within the area over which this Court exercises jurisdiction). The third defendant is described as residing in Bangalore City. The learned Judge dismissed the suit as against the first and third defendants on the ground that this Court had no jurisdiction to try it and as against the second and fourth defendants on the ground that it would be useless to make an administration decree as against them since it was clear on the evidence that all the trust property was in the hands of the first defendant.

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of principles defining, in actions *in personam*, the extra-territorial jurisdiction of the Court."

Order XI of the rules of the Supreme Court draws no distinction between British subjects and foreigners as to their amenability to the jurisdiction of the English Court, the only distinction being that when the defendant is neither a British subject nor in British dominions, notice of the writ and not the writ itself is to be served upon him.

Speaking of Order XI Chitty, J., in the case of *re-Busfield* (1) observes: "The rules embodied in this Order are founded on general principles of jurisprudence; and in the framing of these rules the whole subject has obviously been reconsidered and attention has been directed to the views entertained by the Courts of Scotland and Ireland and by foreign Governments, particularly that of Germany." Sir V. Bhashyam Ayyangar's proposition was that it was contrary to the principles of International Law for a Court to exercise jurisdiction over an absent foreigner solely upon the ground that the cause of action had arisen within the local limits of the jurisdiction of the Court. I do not think the more recent authorities support this proposition.

In the case of *Annamalai Chetty v. Murugasa Chetty and another* (2) the Privy Council were dealing with an appeal from this Court, in which this Court, reversing the decision of the District Court, had dismissed a suit which had been brought on a decree obtained in the French Court at Pondicherry. The ground on which the plaintiff contended that the District Court had jurisdiction

(1) L.R., 32 Ch.D., 123. (2) L.R., 30 I.A., 220; I.L.R., 26 Mad., 544.

In my judgment as regards the first defendant the learned Judge was right. Article 12 of the Letters Patent is in these terms:—

"And we do further ordain that the said High Court of Judicature at Madras, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated or in all other cases if the cause of action shall have arisen either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally work for gain within such limits."

It is clear from the evidence that the first defendant did not, at the time the suit was instituted, "dwell or carry on business or personally work for gain" within the local limits of the ordinary original jurisdiction of this Court. Leave to institute the suit was not obtained. Consequently the only question to be considered is—did the cause of action arise wholly in Madras. In my judgment it did not. Sir Bhashyam Ayyangar, on behalf of the respondent, contended that

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over the appellant was that he carried on business within its jurisdiction (section 17 of the Code of Civil Procedure). This Court held that he did not carry on business within the jurisdiction and dismissed the suit upon that ground. The Privy Council affirmed the decision. In delivering the judgment of the Privy Council Lord Lindley observed: "In both Courts in India it was apparently assumed that the question of jurisdiction turned on section 17 of the Code of Civil Procedure, and that although the defendant was a foreigner, and although the cause of action arose in a foreign country, and although the defendant did not personally reside within the local limits of the jurisdiction of any Court in British India, and was not even temporarily in Arcot when sued there, yet he could be sued in the Arcot Court if he carried on business through an agent in the local limits of that Court's jurisdiction. This assumption appears to their Lordships to require more attention than it has received."

Lord Lindley here enumerates a series of circumstances which, if they co-existed, would make it doubtful whether the mere fact of carrying on business through an agent within the local limits of the jurisdiction of a British Indian Court would give that Court, under section 17 of the Code of Civil Procedure, jurisdiction over an absent foreigner. One of the series of circumstances is that the cause of action arose in a foreign country. The observation therefore does not apply where the cause of action arises within the local limits of the jurisdiction of the Court in which the action is brought. Lord Lindley continues: "Their Lordships see no

no part of the cause of action arose in Madras. However this may be, under the express words of article 12, this Court has no jurisdiction unless the cause of action arose wholly in Madras. The testator lived for the greater part of his life in Mysore and died there; the trust was created in Mysore, the bulk of his estate was in Mysore, the will was made in Mysore; the legatees resided in Mysore at the time of the testator's death, and, with the exception of the plaintiff and her mother, resided in Mysore at the time the suit was instituted. When probate was granted by this Court there were no doubt assets within the jurisdiction of this Court, but the Bombay and Calcutta policy moneys were outside the jurisdiction and were not included in the Madras probate. The proceeds of the Bombay policies were never dealt with by the first defendant in Madras and were invested on mortgage in Mysore. The fact that the cheque for the Calcutta policy was sent to the first defendant through the company's agents in Madras, instead of—as in the case of the Bombay policies—direct to the first defendant at Bangalore is in my opinion immaterial. Whether the cause of action be the right *ex debito justitiæ* to have the estate administered by the Court, or whether the cause of action arose on the formal repudiation by the first defendant of a trust which he had acknowledged and acted under, or on his committing a breach of trust in

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reason for doubting the correctness of the decision of the case of *Girdhar Damodar v. Kassigar Hiragar*(1) where the defendant was a native of Cutch and the cause of action arose within the local limits of the jurisdiction of the British Indian Court in which the action was brought. But that case does not cover the present one."

It seems to me that this observation must be taken to have been made with reference to the general principles of International Law and not with reference to the special enactment which was relied on as giving jurisdiction in *Girdhar Damodar v. Kassigar Hiragar*(1). The enactment there in question was the Bombay Small Cause Courts Act, and under that Act the arising of the cause of action within the local limits does not give jurisdiction unless leave to sue is given, and leave was not given in that case.

Sir V. Bhashyam Ayyangar contended that Lord Lindley's observation with reference to the Bombay case was only intended to apply to cases where the defendant carried on business within the local limits of the jurisdiction of the British Indian Courts. I see no reason why we should so limit the application of this expression of opinion by the Privy Council. In *Tadepalli Subba Rao v. Nawab Sayed Mir Gulam Allikhan*(2), the plaintiff sued on a promissory note payable within the local limits of the Subordinate Court in which the action was brought. The defendant did not reside or carry on business within the jurisdiction. The Subordinate Court dismissed the suit on the ground that it had no jurisdiction. This Court held that the Subordinate Court had

(1) I.L.R., 17 Bom., 662.

(2) I.L.R., 29 Mad., 69.

investing the proceeds of the policies in mortgage securities instead of in Government of India promissory notes as directed by the will—in any one of these views it seems to me that it cannot be said that the cause of action arose wholly in Madras. If the cause of action be a right *ex debito justitiæ* to have the estate administered and the trusts of the will enforced, the facts that the first defendant took out a limited grant of probate in this Court and acknowledged and acted under the trusts created by the will within the local limits of the jurisdiction of this Court do not in themselves in my judgment confer jurisdiction upon this Court to entertain a suit for the administration or the partial administration of the testator's estate. If the cause of action be the repudiation of the will, the first formal repudiation would seem to have taken place in Bangalore (see exhibit M) in August 1898, though this was no doubt followed up by the affidavit of September 1898, affirmed at Bangalore but filed in this Court to which reference has already been made (see exhibit T). Assuming that the fact of the repudiation of the will in Madras was a breach of the obligation in Madras which gave rise to a cause of action, it may be said that there was also a breach in

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jurisdiction to entertain the suit. Sir S. Subrahmaniam Ayyar, J., in his judgment, points out that the ground upon which the Privy Council in *Annamalai Chetty v. Murugasa Chetty and another*(1) upheld the decision in *Girdhar Damodar v. Kassigar Hiragar*(2) was that the cause of action had arisen in Bombay, and that the same ground of jurisdiction existed in the case then before this Court, and the learned Judge was of opinion that the question was governed by the latest pronouncement of the Judicial Committee (i.e., the opinion expressed in the judgment delivered by Lord Lindley in the case to which I have referred) upon the point. I entirely agree with my learned brother's conclusion. I do not, however, take quite the same view as he appears there to have taken with reference to the effect of Lord Selborne's judgment in the case of *Gurdayal Singh v. Rajah of Faridkote*(3). My learned brother reads Lord Selborne's judgment in that case as containing a statement of the law that "the accrual of a cause of action in a particular place does not confer on the Courts of that place jurisdiction over a non-resident foreigner." It seems to me that the question of whether the accrual of the cause of action confers jurisdiction must depend on the terms of the enactment which creates the jurisdiction. If the enactment confers the jurisdiction, the Court cannot decline to exercise the jurisdiction on the ground that the conferring of the jurisdiction was contrary to the general principles of International Law. I do not think this proposition is inconsistent with Lord Selborne's judgment, taken as a whole. In my judgment, in Original Side Appeal No. 6 of 1900 (footnote),

(1) L.R., 30 I.A., 220; I.L.R., 26 Mad., 544. (2) I.L.R., 17 Bom., 662.

(3) (1894) A.C. 670; L.R., 21 I.A., 171 at p. 185; I.L.R., 22 Calc., 222.

Mysore, since it cannot be contended that the trust created by the will in favour of the plaintiff required that it should be carried out in Madras and not elsewhere. It seems doubtful whether, for the purpose of dealing with the question of jurisdiction, even the breach of the obligation can be said to have arisen "wholly" in Madras.

If the cause of action be the breach of trust in failing to invest the proceeds of the policies in Government of India promissory notes, it is difficult to see how the breach can be said to have been committed within the local limits of the jurisdiction of this Court. The accident that the plaintiff happened to be residing in Madras at a time when under the trust created by the will moneys were payable to her by the executors cannot be said to give rise to a cause of action in Madras. The general proposition relied on by the learned Counsel for the appellant, that a suit cannot be brought against any executor or administrator, in his official capacity in the Court of any country but that from which he derives his authority to act by virtue of the probate or letters of administration there granted to him (Williams on 'Executors,' edition 9, Vol. II, p. 1827), does not

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I said "In *Gurdayal Singh v. Rajah of Faridkote*(1) the actual point decided by the Privy Council was that when a decree had been obtained *ex parte* in the Courts of a Native State against a defendant who was not a subject of that State, an action founded on these decrees ought not to be entertained by the Courts of another State or country. . . Lord Selborne, in pronouncing the judgment of the Judicial Committee observes: - 'In a personal action to which none of these causes of jurisdiction apply' (the 'causes of jurisdiction' referred to by Lord Selborne being all causes of a general territorial character) 'a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by International Law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorised by special local legislation) in the country of the *forum* by which it was pronounced.' Here the words 'absolute nullity' are clearly qualified by the words in parenthesis at the end of the passage."

The question for decision in *Gurdayal Singh v. Rajah of Faridkote*(1) was not whether territorial legislation could give jurisdiction against a foreigner, but whether territorial legislation could give jurisdiction against a foreigner *which a foreign Court ought to recognise*. Lord Selborne's words are "no territorial legislation can give jurisdiction *which any foreign Court ought to recognise* against foreigners who owe no allegiance or obedience to the power which so legislates." So, in the case now before

(1) (1894) A.C. 670; L.R., 21 I.A., 171 at p. 185; I.L.R., 22 Calc., 222.

apply to the facts of this case. The probate had nothing to do with the vesting of the property in the trustees. The trusts were created by the will. The executors as trustees under the will might have been sued if no grant of probate had been taken out, and if, at the time of the institution of the suit, the first and third defendants had dwelt or carried on business or personally worked for gain within the local limits of the ordinary original jurisdiction of this Court, they could have been sued in this Court. The interest of the executors in the estate is derived exclusively from the will and vested in them from the moment of the testator's death. Moreover, the Madras probate does not purport to give the executors any authority to act except for the purpose of realizing assets in Madras. The case of *Ewing v. Orr Ewing*(1) which was relied on by the appellant's counsel, affords us no assistance as to what is the "cause of action" in the present case. Moreover, in that case leave had been obtained under order XI of the rules of the S.C. to serve the three Scotch trustees in Scotland. Both Lord

(1) L.R., 9 A.C., 34.

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us, the question is not—will a decree of this Court against the defendant be recognized and enforced by the Courts of another State or country, but has this Court under the enactments which create the jurisdiction of this Court, jurisdiction to make a decree against the defendant? This distinction is pointed out in the judgment of the Bombay High Court in *Rambhat v. Shankar Baswant*(1) where it was held that under the Civil Procedure Code British Courts are empowered to pass judgment against a non-resident foreigner, provided that the cause of action has arisen within the jurisdiction of the Court pronouncing the judgment. In his judgment in that case, Candy, J., observes: "It must be remembered that, in one aspect, the present case is the converse of *Gurdial Singh v. Rajah of Faridkote*(2). Suppose the defendants in this case resided in Belgaum, but the contract giving rise to the cause of action had been made in Sangli territory, and the Sangli Court had assumed jurisdiction and passed a decree against the defendants, then the question would arise, if plaintiff brought a suit in Belgaum against the defendants on the foreign judgment, whether the British Courts could recognise such assumption of jurisdiction, and would treat the foreign judgment as a nullity. So too if the Subordinate Court should pass judgment in the present case against defendants, and plaintiff should bring a suit on that judgment in the Sangli Court, it may be said that the question would arise in the Sangli Court, whether such judgment should not be treated as a nullity. The question for our consideration is not whether the Belgaum Subordinate

(1) I.L.R., 25 Bom., 528.

(2) (1894) A.C. 670; L.R., 21 I.A., 171 at p. 185; I.L.R., 22 Cal., 222.

Selborne and Lord Blackburn lay stress upon the fact that the three Scotch trustees had been served under an order which they did not seek to discharge.

Lord Blackburn observes: "An application might have been made to set aside that service and then the Court would have had to exercise a discretion as to whether that service should be set aside."

The administration suit cannot be regarded as a continuation or extension of the probate proceedings. As Lord Selborne observed in the *Ewing v. Orr Ewing*(1): "The Court which grants probate is not a Court of administration though (where there are no executors nominated by the will) it may appoint administrators. Nor are the executors (in any sense exclusive of the jurisdiction of any other forum, in a case in which it might otherwise attach) officers of that Court." In the case of *Nistarini Dassi v. Nundo Lall Bose*(2), which was also relied upon on behalf of the appellant, no question arose as to

(1) L.R., 9 A.C., 34.

(2) I.L.R., 26 Cal., 891.

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Judge can recognise a certain judgment of a foreign Court, or whether a foreign Court would recognise the judgment of the Belgaum Subordinate Judge if delivered against the defendants in the present case. So conversely in *Gurdial Singh v. Rajah of Faridkote*(1), the question was not whether the Faridkote Court had jurisdiction to pass the judgment it did, and not whether that judgment was valid within the Faridkote territory. The answers to both those questions were apparently in the affirmative".

I have so far dealt with the wider question which was argued in this case and in Original Side Appeal No. 6 of 1900 (footnote). The facts of the present case, however, differ very materially from the facts in the earlier appeal. In the present case the defendant was within the local limits of the jurisdiction on the day the suit was instituted. I am of opinion that, even if the Court would not otherwise have had jurisdiction, this fact gives jurisdiction. The rule as stated by Professor Dicey is "When the defendant, in an action *in personam*, is, at the time for the service of the writ, in England, the Court has jurisdiction in respect of any cause of action in whatever country such cause of action arises." It is to be observed that the test as laid down by Professor Dicey as regards the High Court in England is not service within the territory but presence within the territory at the time for service. Professor Dicey observes ('Conflict of Laws,' p. 45) "The High Court, or rather the Courts of Common Law and of Equity. . . . have always claimed jurisdiction *in personam* over a defendant

(1) (1894) A.C. 670; L.R., 21 I.A., 171 at p. 185; I.L.R., 22 Cal., 222.

the jurisdiction of the Court to entertain the administration suit. The only question was whether, the Court having jurisdiction to entertain the suit, it could set aside certain leases of land out of the jurisdiction which the executors had granted to themselves. Mr. Justice Stanley held that it was competent for the Court to set aside these leases. He puts it thus:—

"If the trustees had assigned some of the properties to a stranger and recovery of the property from such stranger had been sought in the action, a question of jurisdiction might arise; but here it is the executors in whom the property was vested by the will of the deceased who are alone sought to be made responsible for an alleged act of maladministration, namely, the granting of leases of part of the trust estate to themselves." This decision has really no bearing on the point we have to consider, namely, whether, in the present case, the cause of action arose wholly within the local limits of the ordinary original jurisdiction of this Court. The English decisions in similar words as used in the County Courts Acts, the Mayor's Court Act, and the Common Law Procedure Act, 1852, are to some extent a guide as to the construction to be placed upon the words used in article 12 of the Letters Patent. As Sir Adam Bittlestone observes in his

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in virtue of the service upon him of the King's writ, and as the writ can be served upon any one in England, and cannot, except under statute, be served upon any one out of England, this has been in effect a claim to jurisdiction based on the presence of a defendant in England. But such jurisdiction, though originating in technical rules of practice, is in reality based upon the principle of effectiveness. Whenever the King of England could serve a defendant in England with the royal writ, or command, the King could, if he chose, make his judgment effective against the defendant."

It is not really necessary to consider the further question whether in a case like the present, *i.e.*, a case where the defendant was present within the jurisdiction at the time the action was commenced, a foreign state or country would enforce a judgment given by this Court against the defendant. But the question is not irrelevant, because, although it does not follow that because this Court gives a decree against the defendant the Courts of a foreign State or country would enforce it, it does follow that a foreign Court would not enforce a decree given by this Court unless it were satisfied that this Court had jurisdiction to make the decree. In dealing with the jurisdiction of foreign Courts Professor Dicey observes ('Conflict of Laws,' p. 374) "Is residence in the strict sense of the term, necessary, or will the mere presence of the defendant in the foreign country, *e.g.*, France, be enough to give the French Courts jurisdiction? The answer (probably) is that his presence is enough, or, in other words, that residence

judgment in *DeSouza v. Coles*(1), in the course of which he reviews at length all the English decisions under the County Courts Act of 1846—"when words of such familiar use in the English law are adopted in an English legal instrument such as the Letters Patent . . . it is I think reasonable to suppose that they have been used in the sense which has been assigned to them by the decisions of the English Courts; and as it seems to me we ought to be guided in an interpretation of them by those decisions." In the case reported in 1 Bom., 23, the Bombay High Court adopts this view.

Under the Consolidating County Courts Act (51 and 52 Vict., C. 43, s. 74), as has been the case since 1867, a County Court may by leave entertain any action if the cause of action arose within its district either "wholly or in part." But under the County Courts Act of 1846 (see section 60) a County Court had no jurisdiction if "a part of the cause of action" arose outside the local area of its jurisdiction. If a part of a cause of action arises outside a given district, or area, it is obvious that the whole of the cause of action cannot have arisen within that district or area. The decisions under the Act of 1846 are therefore in point.

(1) 3 M.H.C.R., 384.

means for the present purpose nothing more than such presence of the defendant as makes it possible to serve him with a writ, or other process by which the action is commenced." The judgment of Lord Russell in *Carrick v. Hancock*(1) is an authority for the proposition that the English Courts will enforce the judgment of a foreign Court where the defendant was present in the foreign country at the time the action was commenced.

In this country I think the test is—not service of the summons within the local limits, but presence within the local limits at the time of the commencement of the suit. There can, I think, be no question that in this country, except in certain excepted cases, a suit is commenced by the presentation of the plaint. Section 48 of the Code of Civil Procedure says "every suit shall be instituted by presenting a plaint, etc.," and the form of summons recites that a suit has been instituted. See Form 119, Schedule IV, Code of Civil Procedure. The explanation to section 4 of the Indian Limitation Act says that a suit is instituted, in ordinary cases, when the plaint is presented to the proper officer. Sir V. Bhashyam Ayyangar contended that according to the provisions of International Law presence within the jurisdiction at the time the suit was instituted, was not enough and that unless the defendant was served with the process of the Court within the local limits, the Court had no jurisdiction. It seems to me that the authorities do not support this proposition. Sir V. Bhashyam Ayyangar further contended that on the evidence in this case the presence of the defendant was not such as would give jurisdiction,

(1) (1895), 12 T.L.R. App., 59.

The same observation applies to the decisions as to the jurisdiction of the Mayor's Court [which has no jurisdiction when any material part of the cause of action arises out of its jurisdiction, see *Bowler v. Barberton Development Syndicate*(1)] and to decisions under section 18 of the Common Law Procedure Act, 1852 (15 and 16 Vict., C. 76). The decisions under the County Courts Acts as pointed out by the Bombay High Court in 3 Bom., 23, are more in point with regard to the interpretation of the Letters Patent than the decisions under the Common Law Procedure Acts. The provisions of the Common Law Procedure Acts deal with procedure and not with jurisdiction, *i.e.*, they furnish a convenient means of exercising an existing jurisdiction; they are not intended, as the provisions of the County Courts Acts and the Letters Patent, to create and delimit a local jurisdiction. It may be observed that section 75 of the County Courts Act, 1888, expressly provides that proceedings for the administration of the assets of a deceased person shall be taken in the Court within the district of which the deceased person had his last place of abode in England, or in which the executors

(1) (1897), 1 Q.B.D., 184.

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but he declined to attempt to define the presence which would give jurisdiction as distinguished from the presence which would not. I am of opinion, on the facts proved in this case, that the presence of the defendant within the local limits at the time the suit was instituted was such as to give the Court jurisdiction over him.

In the course of the argument the Charters of the High Court of Judicature at Madras and of the Courts which preceded it were minutely examined and discussed. In the view which I take, it is not necessary for me to express an opinion whether, apart from Article 12 of the Letters Patent, this Court has jurisdiction to entertain this suit under the jurisdiction which was conferred upon the abolished Courts and which is now vested in the High Court. I will content myself by saying that in enacting article 12 of the Letters Patent, I do not think the Legislature intended in any way to cut down the jurisdiction formerly exercised by the Courts whose jurisdiction is now vested in the High Court. In a Bengal case, *Punchanund Bose v. Davison*(1)—a case apparently decided under the Bengal Charter of 1774—it was held that a defendant, who was not a British subject, was liable to the jurisdiction as the plaint was filed when he was in Calcutta, East, C.J., observed: "Twenty-four hours' is a sufficient residence to render a person subject to the jurisdiction."

As regards the meaning of the word 'dwell' as used in article 12 of the Letters Patent, Moore, J., considered that the present case was governed by the decision of the Bombay High

(1) Mort. Dec., 149.

or administrators or any one of them shall have their or his place of abode. There is no corresponding or analogous provision in the Letters Patent and the question of jurisdiction has to be determined solely with reference to the question where the cause of action wholly arises. For a long time there was no doubt considerable conflict of authority between Courts in England of co-ordinate jurisdiction with reference to the words "cause of action" as used in the earlier County Courts Act and the Common Law Procedure Act, 1852. The law, however, at any rate as regards actions founded on contract, is now well settled. The most recent English decision with reference to a cause of action arising within specified local limits is the decision of the Court of Appeal in *Payne v. Hogg*(1). By the Salford Hundred Court of Record Act, 1868, jurisdiction is given to the Hundred Court "if the cause of action arose within" a specified area. With reference to these words A. L. Smith, L.J., said (p. 51) the first question raised is as to the meaning of "the cause of action" in section 6, sub-section (1), of the Salford Hundred Court of Record Act, 1868. In my opinion it is now well

(1) (1900), 2 Q.B.D., 43.

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Court in *Goswami Shri Girdhariji v. Shri Govardhan Lalji*(1). This case went to the Privy Council where the appellants' counsel abandoned his contention that the defendant 'dwelt' within the local limits of the jurisdiction. But for this authority Moore, J., was prepared to hold on the facts of the present case that the defendant 'dwelt' within the local limits at the time the suit was commenced. It seems to me that the present case is not governed by the decision which Moore, J., felt bound to follow. The authorities upon the point are discussed in the judgment which has been written by my learned brother. I entirely agree with his reasoning and with his conclusions. I also agree with my learned brother for the reasons stated by him in the judgment, which he is about to deliver, that the cause of action in the present case arose, at any rate in part, within the local limits of the jurisdiction and that the property dealt with in the will was property which the testator could dispose of by will.

I think Moore, J.'s order was right and that this appeal should be dismissed with costs.

SUBRAHMANIA AYYAR, J.—Venkatavarada Ayyangar whose only son is the defendant, lived till he was twenty years of age with his father Srinivasa Aiyangar, who was employed in the Public Service in the District of Madura in this Presidency. Owing to disagreement between the two, Venkatavarada Ayyangar went away in the year 1854 to Mysore and there entered the service of the Durbar as a clerk on a salary of Rs. 30 per month. He was apparently a man of considerable ability and eventually

(1) I.L.R., 18 Bom., 290.

settled by authority that in the case of a Court whose jurisdiction is limited to a certain area an expression of this kind means that all the matters which go to make up the cause of action must have arisen within that area; and the plaintiff's counsel was wrong in suggesting that where the late Master of the Rolls said in *Jackson v. Spittall*(1) to the effect that "cause of action" meant the act which gave the plaintiff his cause of complaint applied in the case of such a Court. Collins, L.J., said "with regard to the first question raised, namely, as to the meaning of 'the cause of action' in section 6 of the Salford Hundred Court Record Act, 1868, I think it clear that it means the whole cause of action as explained in *Cooke v. Gill*(2) and not 'cause of action' as defined in *Jackson v. Spittall*(1), which latter case turned upon a special reading of the language of the Common Law Procedure Act, 1852, which uses the expression 'a cause of action' and not 'the cause of action,' the expression used in the Act we are construing." Romer, L.J., agreed with the other members of the Court as to the meaning of the words "cause of action," in the Act in question.

(1) L.R., 5 C.P., 542.

(2) L.R., 8 C.P., 107.

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rose to the important post of Secretary in the Legislative Department in that Province which carried with it a salary of Rs. 800 and which he held till he retired in the year 1890 on pension. He died on the 24th of August 1892 possessed of property moveable and immoveable of the estimated value of about four lakhs of rupees.

By his last will and testament, which bore date the 3rd August 1892, he gave legacies to his widow, his only daughter and other relations, directed the carrying out of certain charities and made the defendant his residuary legatee. The executors appointed under the will were the defendant's father-in-law, Venkatavarada Ayyangar, who refused to act, the defendant himself and the three plaintiffs in the present suit (of whom the first and the second are now deceased). Of these, the second plaintiff, Biligiri Ayyangar, only was then resident in Madras, he having been a solicitor practising in this Court. The other plaintiffs and the defendant were residents of Mysore though the third plaintiff, the husband of the testator's daughter subsequently settled with his wife in this city. The defendant was born about the year 1872 in Mysore and throughout this litigation he as well as his father has been taken as domiciled there, and as subject to the same system of Hindu Law as that administered in this part of British India. After the testator's death, the executors obtained probate of the will from the British Resident's Court in the Civil and Military Station of Bangalore, which however was not the Court of the place of the testator's domicile, he having

Article 12 of the Letters Patent itself draws a distinction between cases where the cause of action arises wholly, and cases where it arises in part within the local limits. As Mr. Justice Holloway points out in his judgment in *DeSouza v. Coles*(1), the phrase "whole cause of action" has never been used except by the Judges, but I fail to see how any distinction can be drawn between the phrase "if the cause of action arises wholly" within a given area and the phrase "if the whole cause of action arises within that area." I cannot see how the decision in *Jackson v. Spittall*(2), which turned on the construction of the words "a cause of action," is in any way a conclusive authority upon the question of the construction of the words "if the cause of action shall have arisen . . . wholly . . . within, etc." It seems to me that in the present case the title of the plaintiff and the obligation of the defendants were both matters which arose outside the area of the jurisdiction of this Court, and that, consequently, this Court had not jurisdiction to entertain the suit.

With regard to the case of *Luckmeschund v. Zorawur Mull*(3), which was relied upon by the appellant, and which Mr. Justice Holloway in his judgment in

(1) 3 M.H.C.R., 384 at p. 413.

(2) L.R., 5 C.P., 542.

(3) 8 M.I.A., 291.

been a permanent resident of Bangalore City in Mysore Territory proper. Subsequently, on the 20th February 1893, they applied to this Court for probate of the will and obtained it on the 5th May, after giving the prescribed undertaking to administer the estate and to file inventories and accounts, the probate being confined to the assets in this Presidency. By virtue of this probate, the defendant admittedly realised and obtained possession within the limits of the ordinary original jurisdiction of this Court of moveable assets of the value of about Rs. 60,000. Among the assets of the testator were monies due on certain life policies aggregating Rs. 50,000. Under the will, this amount had to be invested in Government paper, and four-fifths of the interest thereof were payable to the testator's daughter for her life and the remaining one-fifth to his widow for her life and after her to the daughter for her life. Of the corpus, the whole was to pass to the daughter's children, and in the event of no children surviving her, to the defendant, he being, in that event, liable to pay half the interest on the said four-fifths to her husband, the third plaintiff, for his life. When these insurance monies were received, the defendant managed to persuade the other executors to consent to his taking sole possession of the fund on the promise that he would invest the same according to the will and apply the interest in payment to the legatees concerned. He however did not invest the money, as he should have done, but lent it to certain parties taking securities in his own name. One of these loans, viz., of the sum of Rs. 27,000 to K. Shama Ayyangar, was made in

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DeSouza v. Coles(1) treated as the governing authority in this class of cases in preference to the decisions of the English Common Law Courts, I entirely agree with the view expressed by Mr. Justice Greene in the case in *Mulchand Joharimal v. Suganchand Shivdas*(2). With reference to the Privy Council decision and to Mr. Justice Holloway's comments thereon, the learned Judge observes:—

"Mr. Justice Holloway in his judgment in *DeSouza v. Coles*(1) lays it down that this decision involves implicitly the following propositions:—

"(1) The making of the contract is a matter perfectly indifferent and is no part of the cause of action.

"(2) The place at which an obligation is to be performed is its seat and the place of jurisdiction. That place of expected performance may be determined by the circumstances of the case, and in a contract of partnership its main seat is the place at which each of the partners is bound to pay what may be due."

With all respect for the opinion of Mr. Justice Holloway, it does not appear to me that the case, when considered, "does involve the propositions mentioned, or, at any rate, the first of them." The decision may rather, it seems to me, be

(1) 3 M.H.C.R., 384 at p. 413.

(2) I.L.R., 1 Bom., 23.

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this city. Biligiri Ayyangar alone approved of these loans being granted, while the widow, the daughter, the late B. G. Krishna Ayyangar, the first plaintiff and the third plaintiff, all objected to and protested against such application of the fund. The defendant made payments for a certain time on account of the interest due to the widow and the daughter, but subsequently withheld payment and in August 1898 he intimated to the plaintiffs and to the said legatees that he repudiated his position as executor and trustee under the will, which, he urged, was invalid, and not binding on him, as the whole of the property referred to in it was the joint property of himself and his father over which the latter had no power of *testamentary* disposition. After this, nothing was done by him in the way of the administration of the estate, which he proceeded to deal with as his own. The daughter thereupon instituted Civil Suit No. 76 of 1899 against the defendant and the present plaintiffs to compel performance of the trusts created in her favour by the will, but in so far as the present defendant was concerned the suit was dismissed on the ground of want of jurisdiction over him. As regards the present third plaintiff and the representatives of the first and second, the suit is still pending, they being sought to be made liable for the loss caused to the plaintiff there in consequence of the breach of trust on the part of their co-trustee the present defendant. When the dismissal of that suit as against the defendant was upheld on appeal, the present action was commenced on the 30th August 1901, leave to institute it having been granted on the 28th idem on the ground that part

treated as one involving this, that in such circumstances as there existed, the contract of partnership on the footing of which transactions were engaged in was not a part of the cause of action, and that not being a part of the cause of action the Court considered the place, where it was made, to be a matter perfectly indifferent. The suit was not one for a breach of any term of the partnership contract, but rather as appears what in English pleading would be called an action on an account stated, the statement of such account having taken place within the jurisdiction of the Court where the suit was brought. The only other form the suit can have assumed would be for a partnership account and where else could the cause of such action be said to arise, except where by the consent of the parties the head-quarters of the partnership had been established, the moneys advanced, the accounts kept and the final accounts of the partnership dealings closed? The language of the judgment is, to say the least, consistent with the existence of the opinion on the part of the Judicial Committee, that the making of the contract not being a part of the cause of action, the fact that it was made out of the jurisdiction was immaterial, and did not preclude the Court from entertaining the suit which was either on an account stated within the jurisdiction in respect of partnership transactions

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of the cause of action arose within the limits of the ordinary original civil jurisdiction of this Court. Though the defendant was residing in Bangalore City prior to March 1901, in that month he removed to Madras with his wife and child having rented a house within the jurisdiction of this Court, in the suburb of Mylapore. In that month he entered into articles of apprenticeship with Mr. Ramachendra Rao Saheb, one of the vakils of this Court, in order to study with him and qualify for enrolment as a vakil of the Court, the term of study and attendance required for the purpose extending under the rules over a period of twelve months. In June 1901 he paid eight months' rent in advance with a view to occupying the house for the whole of that time and stayed in Madras till the afternoon of the 31st August when he went back to Bangalore. In the meantime he probably paid a visit for a few days to Madura where some of the landed properties mentioned in the will are situated. Assuming that he went to Bangalore on the 25th of that month, as he says, he was back again in Madras and spent the 30th and the 31st here. His wife and child were all the time in the house at Mylapore. I disbelieve the defendant's statement that he resolved to remove to Bangalore and announced that intention about 25th, even supposing that such intention or announcement were in any way material to the case, which of course they are not. His own evidence, as well as that of his witness on the point is, in my judgment, of no value. His statement that he left Madras owing to the ill-health of his wife and of himself was, I think, rightly discredited by the learned

the head-quarters of which were within the jurisdiction, or for an account of such partnership transactions.

Inasmuch as, in my view, the obligation was created outside the jurisdiction of this Court, and there is nothing to show that the obligation had to be performed within the jurisdiction, it is not necessary to consider the decision of Kornan and Kindersley, JJ., in *Muhammad Abdul Kadar v. E.I. Railway Co.*(1). But the decision appears in conflict with a long chain of authorities,—English and Indian. The decision has been expressly dissented from in Calcutta and Bombay (see the judgments of the Bombay High Court in *Dhunjisha Nusserwanji v. Pforda*(2) and *Rampurtab Samruthroy v. Premeukh Chandamal*(3) and of the Calcutta High Court in the case in *Doya Narain Tewary v. The Secretary of State for India*(4) and does not appear to have been followed in any reported case in this Presidency.

A question was raised before us on behalf of the respondents which, having regard to the view indicated above, it is not necessary that I should consider.

(1) I.L.R., 1 Mad., 375.

(2) I.L.R., 11 Bom., 648.

(3) I.L.R., 15 Bom., 93.

(4) I.L.R., 14 Calc., 256 at p. 270.

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Judge. The truth appears to be that it was only after the defendant became aware of the institution of the present suit that he left Madras in order to avoid the service of the summons being effected on him personally within the jurisdiction. The suddenness and the hurry which marked his leaving Madras on the 31st and which apparently prevented him from even communicating to Mr. Ramachendra Rao Saheb that he was going away are strongly in favour of the above view. When the defendant left Bangalore in March he had his house there shut up, employing only a watchman to look after it, and in the instrument of apprenticeship executed by the defendant, Mylapore was stated to be his place of residence.

Now as regards the character of the property referred to in the will. Part of the property was no doubt ancestral having devolved on the testator in the partition which took place between him and his half-brothers in the year 1864, that is, two years after the death of their father Srinivasa Ayyangar. This ancestral share consisted partly of landed property which is not shown to have yielded any considerable income—viz., a house and a cart-stand in the town of Madura itself and some agricultural land in certain villages in that district—and the remainder, Government promissory notes of the value of about Rs. 8,000. The case of the defendant is that, with the moveable property thus received, the testator traded in cotton and made large profits, that these profits, the savings of the testator from his salary and the income of the landed property in Madura were from the beginning mixed up

The point, however, was fully argued, and it seems desirable to deal with it. It was argued on behalf of the first defendant that even assuming that the cause of action arose wholly in Madras, inasmuch as the first defendant was a foreigner and not resident in Madras, this Court had no jurisdiction *in personam* over him. No issue was raised as to the defendant being a foreigner and the evidence on the point is not conclusive. I assume, however, for the purposes of the question under consideration, that the domicile of the first defendant is Mysorean and that he is a subject of the State of Mysore owing allegiance to the Maharajah of Mysore.

Of course, no exception can be taken to the general proposition that every statutory enactment should be interpreted and applied, so far as its language admits, so as not to be inconsistent with the comity of nations or with the established rules of International Law. But if a legislative enactment cannot be construed without contravening the principles of International Law, it is none the less the duty of the Municipal tribunals governed by the enactment to give effect to it. In the case in *St. Gehain Co. v. Hoyermann's Agency* (1) Lord Esher, in

(1) (1893), 2 Q.B.D., 96.

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and since the defendant's birth in 1872 held jointly by both, and that, consequently, the testator had no power to dispose by will of any portion of such joint estate. Some oral evidence was called as to the testator having, for the first time, commenced trading in cotton with the money got by him at the partition but on the face of it, it is worthless. It is admitted that from the time when the testator came away to Mysore having quarrelled with his father, up to the time of the partition, he got nothing whatever from the paternal estate. Between 1854 and 1864 he rose in the service and at the time of the partition he held the post of Sarishtadar on Rs. 300 per mensem. That he had, during the period, put by a comparatively large sum of money, is proved by the fact that subsequent to his father's death, pending the division of the estate, the testator advanced in connection with his father's exequial ceremonies and the maintenance of his step-mother and step-brothers as well as other expenses connected with the undivided family, no less than Rs. 7,000 which were recouped to him at the time of the partition. That he had at the time more money than the said Rs. 7,000 also appears from the evidence. As it is unlikely he could have saved so much as this from his pay merely and as even before 1861 he had been engaged in trade in cotton in partnership with others, the suggestion that his trade profits were all to be traced to what he got at the partition must be rejected. Nevertheless there remains the question whether the testator kept his own earnings separate from the property which came to him at the time of the partition, as he was entitled to do,

dealing with the construction of O. XLVIII A.R.11 of the R.S.C., states the principle in these words: "The words 'any person' are of course large enough to include a foreigner, and a foreigner who is resident abroad and to include one who has never been in England in his life, and has never had what has been called the protection of the English law, and merely carries on business in England by his agents. But the question is, ought the Court to give an interpretation to the words which would include such a person? If the rule had contained the words expressly in terms including a foreigner resident abroad, then an English Court would be bound to obey the directions of its own legislature, but when the words used are capable of one or other construction, then the Court ought to adopt the construction which will prevent an infringement upon the principles of International Law by extending the jurisdiction of the English Courts against foreigners residing abroad who have in no way submitted to their jurisdiction."

So far as the Indian authorities are concerned they certainly, in my judgment, support the view that, where the cause of action arises wholly within the local limits, or where the cause of action arises in part within the local limits, and leave to institute the suit has been obtained, the Court has jurisdiction over a non-resident foreigner.

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so as to preserve his complete control over the same, or incorporated them all into one estate so as to make the whole the joint property of himself and of any male issue he might beget. That the testator adopted the former course cannot be doubted. The assertion in the will itself to that effect is not a bare unsupported statement, for he refers to accounts kept up by him all through showing what were his own acquisitions and what were ancestral. That this precaution was adopted from the time of the partition appears from the partition deed itself in which he takes care to say that the advances to the family were out of his "own" funds. As at that time he had no son, the immediate object of keeping such accounts could not have been the retention of the power of disposition in his own hands as against his issue. The reason for his keeping separate accounts, thus, is to be found in the existence of step-brothers who were minors at the time. That he anticipated claims on their part with reference to his own acquisitions will be seen from the defendant's letter dated the 26th June 1895, exhibit G, an anticipation which was not altogether ill-founded, considering that soon after his death one of the step-brothers did set up a claim that all the estate the testator had was the joint property of the testator and his brothers. But be the reason what it may, there is no doubt, as already stated, that the testator left at his death documents which would clearly show how much of the assets left by him were his own acquisition and therefore at his disposal. That these documents passed into the hands of the defendant is proved by his own affidavit filed in this Court. They

In the case in *Kessowji Damodar Jairam v. Khimji Jairam*(1) it was held that a person who was not a British subject but who, at the time the suit was instituted, carried on a branch business at Bombay through an agent, was not liable to be sued in the High Court of Bombay where the cause of action arose wholly outside the jurisdiction of that Court. The point which Mr. Justice Scott had to consider in that case was whether the word 'defendant' as used in article 12 of the Letters Patent in connection with the carrying on of business, was limited to British subjects. Admittedly the cause of action arose wholly outside the jurisdiction. The question which the learned Judge put to himself was "can I give the word 'defendant' in the same sentence a double meaning, i.e., a limited sense as regards jurisdiction over those who carry on business and a general sense inclusive of foreigners and British subjects in its application to those who personally work for gain or dwell there?" His answer to this question is in the affirmative and he construes the words "if the defendant . . . shall carry on business" as meaning "if the defendant being a British subject . . . shall . . . carry on business."

(1) I.L.R., 12 Bom., 507.

have not now been produced, and it is certain that they are withheld by the defendant because they would disprove his story that the testator had incorporated all property which came into his hands into one joint estate. The conduct of the defendant during the six years between 1892 and 1898 is consistent only with the view just stated. The defendant was not altogether uninformed at the time of the testator's death; he had graduated in Arts by that time and was then studying law in the Madras Law College where he underwent the whole course of instruction prescribed for the examination for the Bachelor of Laws Degree which he eventually took. His correspondence with Biligiri Ayyangar shows that even in 1892 he had paid close attention to the law as to the rights of members of an undivided family, and the story he now tells that it was owing to ignorance of his rights that he continued to act upon the will is an utterly incredible and untrue story. It must therefore be taken as well established that except the house, the cart-stand and the Bodinayakkanpatti and Athur lands (exhibit E), the rest of the property dealt with by the will were the testator's own acquisition and at his disposal by will or otherwise.

Such being the facts of the case, so far as they are material, I have now to consider the question of jurisdiction which was argued at length and learnedly on both sides. I shall deal with this point, first with reference to section 12 of the Letters Patent.

In proceeding to do so, I ought at once to say that the rule of the Civil Law *actor sequitur forum rei* so much relied on by Sir

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In the case in *Girdhar Damodar v. Kassigar Hiragar*(1), on a reference under the Presidency Small Cause Court Act, 1882, an exactly similar question of construction arose.

Sir Charles Sargent and Mr. Justice Starling declined to follow the decision of Scott, J., and held that the Court had jurisdiction. The question of the effect of the cause of action having arisen within the local limits upon the question of jurisdiction did not arise in that case since, under the Small Cause Courts Act, the fact that the cause of action arose, wholly or in part, within the local limits does not give the Court jurisdiction unless leave to institute the suit has been obtained, and leave was not obtained in that case.

In the case in *Ram Rajji Jambhekar v. Prathaddas Subkarn*(2), at the time of the institution of the suit the defendant had ceased to carry on business within the local limits, but part of the cause of action had arisen within the local limits and leave to institute the suit had been obtained. The point, therefore, which the Court had to consider was precisely the same as the point in the present case, since in the present case, assuming the cause of action to have arisen

(1) I.L.R., 17 Bom., 662.

(2) I.L.R., 20 Bom., 133.

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V. Bhashyam Ayyangar in the course of his argument, has nothing whatever to do with this case in its circumstances. The contrast which exists between the Civil Law and the Common Law system, as it has been called, in regard to a matter such as this, has been brought out very elegantly by M. Pillet (referred to by Westlake as one of the latest and ablest writers on Private International Law—Westlake's 'Private International Law,' p. 23, fourth edition) in a paper published in March last strongly advocating the unification, subject to absolutely necessary exceptions, of the rules as to jurisdiction over foreigners. He says "Jurisdiction of English Courts of justice over personal actions depends on rules quite different from those which governed Roman, and still control French law. More than that the very spirit of these rules and the manner of their construction belong to systems very far apart. In France (as formerly in Rome) one asks first if the French Courts have jurisdiction; this primary question out of the way, the law gives the complainant a way of summoning his opponent before the tribunal which is to judge him. In England and America the process is reversed; one seeks first to find out if the writ of summons (*l'assignation*) can be legally delivered to the person wanted (personal service) or something equivalent done (substituted service). Then, once it is established that the writ can be regularly served, the jurisdiction of the English Courts naturally follows" (Harvard's 'Law Review,' Vol. XVIII, p. 335). The English rule, it must be observed, undoubtedly rests on a principle of prime importance to every Government—the principle

wholly within the local limits, no leave to institute the suit was necessary. The Court held that the reasoning upon which the decision reported in *Girdhar Damodar v. Kassigar Hiragar*(1), was founded was applicable to the case then before the Court. The Court adopted this reasoning and held that the plea to the jurisdiction failed. Of the three Bombay cases, therefore, the two later decisions taken together are direct authorities in support of the view that this Court would have jurisdiction and the earlier case is not really an authority which conflicts with this view since, admittedly, the cause of action in that case arose wholly outside the local limits. It is to be observed, moreover, that the decision in the case reported 20 Bom., 133 was after the decision of the Privy Council in the case of *Gurdial Singh v. Rajah of Faridkot*(2).

In the Faridkot case the actual point decided by the Privy Council was that when a decree had been obtained *ex parte* in the Courts of a Native State against a defendant who was not a subject of that State, an action founded on this decree ought not to be entertained by the Courts of another State or country. If the judgment in the Faridkot case is to be regarded as concluding the question of

(1) I.L.R., 17 Bom., 642.

(2) (1894), A.C., 570.

of local allegiance which Phillimore classes under the head of a state's self-preservation (Phillimore's 'International Law,' Vol. I, pp. 320 and 454). A foremost English authority on this point is the passage cited by Mr. Cohen in *Carriek v. Hancock*(1) from *Calvin's case*(2), where Sir E. Coke divides allegiances into natural, acquired, and local, the last of which he defines to be "when an alien in amity cometh into England, because so long as he is within England he is within the King's protection; therefore so long as he is here he oweth unto the King a local obedience, or ligeance, for the one (as it hath been said) draweth the other." It is not necessary to refer to the other authorities to which the Advocate-General called our attention in regard to a proposition so fundamental.

With reference to this Sir V. Bhashyam Ayyangar urged two contentions. The first of them was that the presence of a foreigner, in order to confer jurisdiction, should be an abiding in the place involving permanency (though not of the character required to establish a domicile) as opposed to a temporary stay or a mere temporary locality of existence. But it is perfectly clear that this distinction is not drawn by the authorities and that such of them as refer to residence in this connection do not mean residence in any technical sense. Phillimore in all the passages cited by Sir V. Bhashyam Ayyangar uses the term "commorant" (International Law, 3rd edition, Vol. I, pp. 320, 443, 446 and 454 and Vol. IV, p. 725) which is apparently now in vogue only as a legal term and means "dwelling, ordinarily residing, inhabiting." Webster, from whom this explanation is taken, adds that in American Law

(1) (1895), 12 T.L.R. App., 59.

(2) 7 Rep., 9.

jurisdiction in the present case, it follows that, in construing article 12 of the Letters Patent, the words "the defendant being a British subject" must be read into the article after the words "in all other cases." I do not think that it was ever intended by the Judicial Committee that their decision in the Faridkot case should have such far-reaching consequences.

Lord Selborne, in pronouncing the judgment of the Judicial Committee, observes:—"In a personal action to which none of these causes of jurisdiction apply" (the "causes of jurisdiction" referred to by Lord Selborne being all causes of a general territorial character) "a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorized by special local legislation) in the country of the forum by which it was pronounced." Here the words "absolute nullity" are clearly qualified by the words in parenthesis at the end of the passage. The question therefore is—is there an authority by special local legislation (in the present case article 12 of the Letters Patent) by virtue of

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it means "inhabiting or occupying temporarily." The passage in p. 320 of Phillimore, viz., "strangers, whether domiciled and commorant (*habitans*) or merely travellers through the country (*etrangers qui passent*)" shows that the term in question is used only by way of contrast with mere passage through the country and does not necessarily involve any definite duration, intent or other special element; nor does the conjunction of 'commorant' with 'domicile' in that passage imply more, for in Vol. IV, p. 725, the author writes "It is true, that to this proposition is generally added by writers the qualification, that the defendant should be domiciled in order to found the competency of the tribunal; but not domiciled in the strict sense of the term, *animo et facto*, with intention of permanent residence; domiciled in the sense of commorant appears to be all that the English Law requires." Story on Conflict of Laws, to which also Sir V. Bhashyam Ayyangar referred us, is even more clear, for, in section 29, the second of the axioms of Huberus is stated to be that all persons who are found within the limits of a Government, whether their residence is permanent or temporary, are to be deemed the subjects thereof. In section 541, the same axiom is quoted with the comment "And further, that he (the Sovereign) may of strict right make laws for all foreigners who merely pass through his dominions, although commonly this authority is exercised only as to matters of police." In *Ex parte Blain*(1) James, L.J., says: "Every foreigner who comes into this country for *however limited* a time, is, during his residence here, within the allegiance of the Sovereign, entitled to

(1) L.R., 12 Ch.D., 522 at p. 526.

which a decree against a foreigner when the cause of action has arisen within the local limits is not a "mere nullity" in the country of the forum in which it is pronounced. In other words, are we to read article 12 as it stands, or are we to read into it the words "the defendant being a British subject" after the words "in all other cases"?

In the case in *Nalla Kuruppa Settinar v. Mahomed Iburaam Sahib*(1), this Court was of opinion that the question there raised was included by the judgment of the Privy Council in *Gurdial Singh v. Rajah of Faridkote*(2). Butal though there was an issue raised as to whether the Ceylon Court had jurisdiction over the person of the defendant who was domiciled and resident in British India, the question for decision was—not whether the Ceylon Court had jurisdiction but whether in the Courts of this country an action could be maintained on a decree obtained in Ceylon, the defendant being domiciled and resident in British India. The finding of this Court that the Ceylon Court had no jurisdiction was not necessary for the purpose of deciding the question before the Court, and is in conflict with the two

(1) I.L.R., 20 Mad., 112.

(2) (1894), A.C., 670.

the protection of the Sovereign, and subject to all the laws of the Sovereign." If it be necessary to fortify further the statement that the presence of a foreigner within the local limits confers jurisdiction, without reference to the length of his stay, I cannot do better than call attention to an observation of the Earl of Selborne in the case of *Gurdial Singh v. Rajah of Faridkote*(1), to what fell from Lord Russell of Killowen in *Carrick v. Hancock*(2) and to a passage in the judgment of Baldwin, J., in *Fisher, Brown & Co. v. Fielding*(3) decided by the Supreme Court of Connecticut. It is noteworthy that these were all cases in which foreign judgments were sought to be enforced and therefore *a fortiori* cases, since it is very common for the Courts of a country to entertain actions under circumstances in which they would not admit that the jurisdiction would be sufficiently founded to entitle the judgment of a foreign court pronounced under similar circumstances to be recognised as internationally binding (Westlake's 'Private International Law,' 4th edition, p. 232; see also Dicey's 'Conflict of Laws,' p. 45). In the first of the cases referred to, viz., *Gurdial Singh v. Rajah of Faridkote*(1) the Earl of Selborne says "Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it." In the second case Lord Russell of Killowen points out that "the time the person is actually in the territory is wholly immaterial" (*Carrick v. Hancock*(2)). The following I extract from Baldwin, J.'s judgment referred to, which was concurred in by the majority (the dissent being on a point not material here):—"The

(1) (1894), L.R.A.C., 670; L.R., 21 I.A., 171 at p. 185; I.L.R., 22 Calc., 222.

(2) (1895), 12 T.L.R. App., 60.

(3) 32 Lawy. Rep. Ann., 239.

Bombay cases (one of which was decided after the decision of the Privy Council in the Faridkot case) referred to above.

The application of the words "when authorised by special local legislation" as used by Lord Selborne in the judgment in the Faridkot case is illustrated by the judgment of the Privy Council in *Ashbury v. Ellis*(1).

In that case the Privy Council held that under the enactment which created the New Zealand Legislature the New Zealand Legislature were empowered to subject to the tribunals of that country persons who were neither by themselves or their agents present in the Colony.

With regard to the question of enforcing a judgment so obtained in the Courts of another country the Judicial Committee observe:—"It was said that a judgment so obtained could not be enforced beyond the limits of New Zealand, and several cases of suits founded on foreign judgments were cited. Their Lordships only refer to this argument to say that it is not relevant to the present

(1) (1898), A.C., 389.

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rights of sovereignty extend to all persons and things, not excepted by some special privilege, that are within the territory of the sovereign. An alien friend, however transient his presence may be, is entitled to a temporary protection and owes in return a temporary allegiance. The fact that the defendant was a foreigner, making but a brief stay (of 2 days) in the country, and on the point of leaving it for his own, did not deprive the Courts of The Common Law, so far as it concerns the enforcement of a pecuniary liability, goes further (than the Roman Law) and operates alike upon every private individual who may be found, however transiently within the territories where it is in force" (*Fisher, Brown & Co. v. Fielding*(1)).

The next contention of Sir V. Bhashyam Ayyangar was that to found jurisdiction over a foreigner present within the limits there should, in addition, be personal service of the writ on him while within the territory, or at least such process should have been actually issued during the time of the presence of the defendant. This is obviously untenable; for the jurisdiction springs up as the result of allegiance existing at the time of the commencement of the action and not of any subsequent process in it. The Lord Chief Justice clearly means this in *Carrick v. Hancock*(2) when he says: "The duty of allegiance is correlative to the protection given by a State to any person within its territory. This relationship and its inherent rights depend upon the fact of the person being within its territory" and Baldwin, J., in the judgment already quoted from puts the same in somewhat fuller terms:

(1) 32 Lawy. Rep. Ann., at pp. 239, 241. (2) (1895), 12 T.L.R. App., 60.
issue. When a judgment of any tribunal comes to be enforced in another country, its effect will be judged of by the Courts of that country with regard to all the circumstances of the case." The same principle was enunciated by James, L.J., in *Ex parte Blain*(1). In dealing with the question of jurisdiction of the English Court of Bankruptcy to make an adjudication of bankruptcy against a foreigner the learned Judge says:—"English legislation has said that if a debtor allows his goods to be taken in execution, certain consequences shall follow, and English legislation has a right to say that with regard to an English subject. But what right has it to say so with regard to a Chilian? No doubt it has a right to say to a Chilian, or to any other foreigner: 'If you make a contract in England, or commit a breach of a contract in England, under a particular Act of Parliament, a particular procedure may be taken by which we can effectually try the question of that contract or that breach, and give execution against any property of yours in this country.' But that is because the property is within the protection and subject to the powers of the English

(1) L.R., 12 C.D., 522.

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"The defendant accepted the forum when he voluntarily placed himself on English soil, and so came under an implied obligation to respect such legal process as might be served upon him there, to the extent of satisfying any resulting judgment duly rendered for a pecuniary demand. The law raises this obligation because the interests of human society require it, and it is not escaped by departing from one country into another" *Fisher Brown & Co., v. Fielding*(1). The mention in some of the authorities relied on by Sir V. Bhashyam Ayyangar in support of the present contention of his, of service of writ on the defendant, must be understood as made with reference to the practice of beginning an action by a writ and has no literal application to cases in this country where according to the prescribed procedure, save in exceptional cases expressly provided for by the statute, e.g., section 22 of the Indian Limitation Act and section 32 of the Civil Procedure Code, the suit is commenced by the presentation of the plaint, as appears *inter alia* from the terms of the very form of summons to the defendant prescribed by Rule 22 of the Rules of the Court on the Original Side. Matters connected with service of process though they may affect the progress of a cause or its result are obviously in their nature matters of mere procedure and in no sense jurisdictional (cf. *Duder v. Amsterdamsch Trustees Kantoor*(2) see also Dicey's 'Conflict of Laws,' p. 35). With reference to this conclusion that jurisdiction over a foreigner present, is independent of actual service of process on him within the territory, no doubt it may naturally enough be asked how

(1) 32 Lawy. Rep. Ann. at p. 241. (2) (1902) 2 Ch.D., 132 at p. 143.
law. To what extent the decision of such a question would be recognized abroad remains to be considered, and must be determined by the tribunals abroad. If a foreigner, being served with a writ under the provisions of the Judicature Act, did not choose to appear, and the Legislature said, 'If you do not appear you will commit a default in that way, and we will give a judgment against you,' whether that judgment would, under such circumstances, be recognized by foreign tribunals, as being consistent with International Law and the general principles of justice, is a matter which must be determined by them."

The question whether a Court is entitled to exercise jurisdiction is entirely distinct from the question whether where a Court has adjudicated, the adjudication can be made the foundation of an action in the Courts of another country. The only principle of International Law which is relevant in regard to the first question is that the enactment which creates the jurisdiction, should, if susceptible of more than one construction, be interpreted in conformity with the comity of nations and the principles of International Law. If it cannot be so interpreted it is none the less the duty of the tribunal, assuming the conditions

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then does the rule come to be formulated in the terms employed by writers on the subject as for example by Dicey: "the legal service of a writ defines jurisdiction" ('Conflict of Laws,' page 234). The answer is furnished by the now-forgotten origin of these rules as explained by M. Pillet thus:—"The two great traditional rules of English law in regard to jurisdiction (over foreigners) are thus described:—Whenever the defendant, even if only passing through the country, is found on English soil, so that in consequence the writ of summons can be personally served, the English Courts can take cognizance of the personal actions which concern him. And conversely, in principle at least, (for this second rule is far from being as absolute as the first) whenever the writ cannot be delivered to the defendant personally, because he is not on English soil, the English Courts have no jurisdiction over him. We do not think these rules could form the basis of a good international system of jurisdiction. They represent for us the law of a period when the working of justice was uncertain, its means of action few and limited, and when the first condition of obtaining the satisfaction demanded from a debtor was the ability to put your hand on his collar. At that same time the magistrates of our *parlements* were obliged to leave their seats to watch personally over the execution of their decrees. It is common knowledge that this was the origin of the judicial vacations. Moreover, it must be noticed that in those old days the arrest of the body was the common right, so that the presence of the debtor at the bar of the tribunal was usually a sufficient

prescribed by the enactment for the exercise of the jurisdiction are shown to exist, to adjudicate: although in such a case the tribunals of other countries, in accordance with the principles of International Law, would decline to recognise the adjudication as in any way binding upon them. So far I have dealt generally with the decision in the Faridkot case. I would observe, however, that in the Faridkot case the decree was obtained *ex parte* although it would seem that the defendant had notice of the suits and had an opportunity of appearing though he advisedly declined to do so. In the present case the defendant appeared and pleaded to the jurisdiction, but in his plea to the jurisdiction he did not, in his written statement, raise the point that he was not amenable to the jurisdiction of this Court by reason of his being a foreigner owing allegiance to the Maharaja of Mysore and no issue was taken with reference to it. In these circumstances, if any decision turned upon the question now under consideration, I should feel some doubt as to whether the first defendant was entitled to rely on this defence.

A number of cases as to the construction of R.S.C. order XI (service out of the jurisdiction) and of the old rules 6 and 7 of order IX—now superseded by O XLVIII A—(service on partners or a firm) were cited in argument—which

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guarantee to the creditor of the effective execution of his judgment. Times have changed, however. To eyes not accustomed to these things by the daily course of practice such principles seem very extraordinary." (18 Harv. 'Law. Review,' 355, 356.) Needless to say our present concern is neither with the view urged by the learned writer that the English rules in question are less suited than the French rule of jurisdiction—the tribunal of the domicile—to form the basis of a good international system of jurisdiction, nor, with how the English rules have come to be expressed in the round-about fashion in which they are stated; but with their substance, *i. e.*, with the principle on which they are now rested by the accepted authorities in actual practice. It follows from what has been said that the presence of the defendant on the 30th August in Madras placed him for the time being precisely in the position of an ordinary subject of His Majesty with reference to the question of jurisdiction. Consequently, in deciding it with reference to the language of section 12 of the Letters Patent there is no scope for resorting as there might be, were the defendant a non-resident foreigner, to the rule of construction that in interpreting parliamentary statutes, judges will, where the language admits of it, proceed on the presumption that the legislature did not intend to contravene principles of International Law.

Such being the case there can be no doubt that this Court had jurisdiction under the section on the ground that the defendant was at the time of the commencement of the suit *dwelling* within

illustrate the general principle. But I do not think any useful purpose would be served by examining these cases in detail since they all turn on the precise words as used in the rule under consideration. As regards the bankruptcy cases the English Courts in dealing with this class of cases have always been largely influenced by the consideration that bankruptcy affects a man's status. In the most recent decision *re A.B. & Co.*(1), Lindley, M. R., puts it thus: "It must be borne in mind that bankruptcy is a very serious matter. It alters the status of the bankrupt. This cannot be overlooked or forgotten when we are dealing with foreigners, who are not subject to our jurisdiction. What authority or right has the Court to alter in this way the status of foreigners who are not subject to our jurisdiction? If Parliament had conferred this power in express words, then, of course, the Court would be bound to exercise it. But the decision goes to this extent, and rightly, I think, in principle, that unless Parliament has conferred upon the Court that power in language which is unmistakable, the Court is not to assume that Parliament intended to do that which might so seriously

(1) (1900), 1 Q.B.D., 541.

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the ordinary original jurisdiction of the Court and also on the ground that part of the cause of action accrued within those limits, leave having been obtained as required by the section. Before stating the reasons for this conclusion I ought to say that the suggestion of Sir V. Bhashyam Ayyangar that a comparison of the section in question with the corresponding provisions which governed the Supreme Court (to whose jurisdiction and powers, the High Court succeeded) shows an intention on the part of the framers of the Letters Patent to limit rather than extend the jurisdiction and powers, is to my mind the very contrary of their intention. This is shown by the fact that the accrual of even a part of the cause of action within the limits has been made a sufficient ground of jurisdiction if leave be obtained. Nor should the word "dwelt" be understood to have been used in any narrow or technical sense considering that very early the Judges of the Supreme Court at Calcutta had ruled that such short stay as twenty-four hours on the part of the defendant within the limits of the Court enabled it to exercise jurisdiction over him as an 'inhabitant' within the meaning of the provisions then in force (*Punchanund Bose v. Davison*(1)).

Taking up now the first ground *viz.*, whether the defendant was dwelling within the jurisdiction at the commencement of the suit, I am unable to agree in the conclusion arrived at by the learned Judge though with hesitation. If what was said in the Bombay case, which the learned Judge felt bound to follow, was really meant to lay down that the term 'dwells' in the section

(1) Mort. Dec., 149.

affect foreigners who are not resident here, and might give offence to foreign Governments."

The conclusion at which I have arrived is that if the cause of action in this case had arisen wholly within the local limits this Court would have had jurisdiction to entertain the suit as against the first defendant. But inasmuch as, my judgment, the cause of action did not so wholly arise, I think Shephard, J., was right in dismissing the suit as against him. As regards the third defendant he entered an appearance in the ordinary course and did not plead to the jurisdiction. I think he must be taken to have submitted to the jurisdiction. I think the suit ought not to have been dismissed as against him.

As regards defendants Nos. 2 and 4 they were residents within the jurisdiction at the time the suit was instituted, and I see no reason why the plaintiff is not entitled to the decree prayed for as against them. The fact that all the trust property is in the hands of the first defendant does not appear to me to be a good reason for dismissing the suit as against defendants Nos. 2 and 4. There is an allegation of wilful default in the carrying out of the trust as against all the executors (see paragraph 9 of the plaint) and it seems to me that this

imports any permanency of residence, such interpretation is not one warranted by the authorities. In *Bailey and Pegg v. Bryant*(1), it was held that a person who resided in a house in London only about three months in a year while the rest of the year he spent at his residence in the country, 'dwelt' in London within the meaning of the City of London Small Debts Court Act of 1852. In *in re Norris*(2) where the words to be construed were "ordinarily resided" the Court decided that a person who had taken up a room in a hotel which he paid for and from which he addressed letters and where he was constantly seen, ordinarily resided there within the meaning of Bankruptcy Act, 1883, though his wife and family resided at Brussels and the person himself was going backwards and forwards to Brussels and other places. The Lord Chancellor remarked that such a question was one of fact and of degree in each case. In *in re Hecquard*(3) which was also a case under the same Act it was held that a domiciled Frenchman ordinarily residing in Paris who, on coming to London in connection with an action he had commenced, took up certain rooms in a house in London and occupied them exclusively for three months with his wife and two servants, in the meantime paying frequent visits to France, had a dwelling in England. In *Ex parte Bruell*(4) James, L.J., points out that the word 'residence' has no definite technical meaning but should be construed in every case in accordance with the object and intent of the Act in which it occurs. In *Mahomed Shuffli v. Laldin Abdula*(5) Sargent, J., was of

(1) 28 L.J.Q.B., 86.

(2) 4 T.L.R., 452.

(3) L.R., 24 Q.B.D., 71.

(4) L.R., 16 Ch.D., at p. 487.

(5) I.L.R., 3 Bom., 227 at p. 229.

involves a charge of specific breach of trust as against them all (see *Barber v. Mackrell*(1)).

In my opinion as regards the first defendant the judgment of Shephard, J. (subject to the question of costs which I will mention later) should be affirmed and the appeal dismissed. As regards defendants Nos. 2, 3 and 4 I think that the plaintiff is entitled to the relief claimed as against them and that, as against them, the appeal should be allowed.

Notwithstanding that in my view this Court has no jurisdiction to entertain this suit as against the first defendant, I think we have jurisdiction under section 220 of the Code of Civil Procedure and article 21 of the Letters Patent to order that the cost of the plaintiff both in this Court and in the Court below should be paid out of the estate, and, in the special circumstances of this case, especially having regard to the fact that for a period of about four years the first defendant admitted and acted under the trust, I think this is the order we ought to

(1) L.R., 12 Ch.D., 534.

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opinion that the words 'dwell' and 'reside' express substantially the same idea and that the meaning to be given to such words depends on the intention of the legislature in framing the particular provision of law. In *Everet v. Frere*(1) Brandt, J., took the same view and held that an officer proceeding from Burma to England on leave and residing a few days in Madras on the way, resided there for the purposes of the section relating to arrest before judgment. In the recent case of *Fernandez v. Wray*(2) the defendant who held the office of Resident at Kolhapur and who had left the place on leave for a year and stayed in Bombay on his way to England for four days was held within the meaning of section 12 of the Letters Patent to have dwelt in Bombay on one of those days when the suit was commenced against him in the High Court. Now but one conclusion seems possible when the *ratio decidendi* of the above cases is applied to the facts here, which recapitulated are:—The defendant shuts up in March his house in Bangalore as a place of residence and proceeds to Madras. He then takes up a house for his exclusive occupation and occupies it with his wife and child. He eats there, sleeps there and is to be constantly seen there. He next enters into a contract with a professional man in order to qualify himself for the legal profession—a contract which involved an uninterrupted stay in Madras for the period of at least 12 months, study with the person to whom he had become apprenticed and attendance at the Law Courts during that time. The defendant acts upon the contract spending his

(1) I.L.R., 8 Mad., 205.

(2) I.L.R., 25 Bom., 177.

make I think the defendants should bear their own costs here and in the Court below.

DAVIES, J.—The plaintiff sues the four executors of her father's will to carry into effect the trust created therein in her favour. The subject of the trust is a specific sum of about Rs. 50,000, the proceeds of certain policies of life assurance of the deceased testator and it is directed by the will that this money be invested in Government of India promissory notes and the interest on four-fifths thereof be paid to the plaintiff and the remaining one-fifth to the deceased's wife and after her death to the plaintiff. After plaintiff's death her children are to inherit. The testator died in August 1892, and the first defendant, his son, the only working executor, received from the insurance companies in due course the above said sum of Rs. 50,000. The papers show that Rs. 23,510-11-0 was received in July 1893 and the first defendant admits the receipt of the whole Rs. 50,000, by the 4th of May 1894, in paragraph 11 of his affidavit (exhibit 8). He paid the plaintiff interest on her portion of the fund, namely, Rs. 40,000 at 6 per cent per annum, i.e., Rs. 200 a month up to August 1893 and for the next four months, i.e., to the end of 1896 at 3½ per cent., the rate of the current Government loan, in which, however he had not, and never has invested the money. From January 1897 the plaintiff has received nothing by way of interest and is not aware of what has

time in Madras till the end of August. In these circumstances it is impossible not to hold that during the whole of the six months the defendant dwelt in Madras and in Madras only.

Passing now to the other ground of jurisdiction, I content myself with resting my view on the single fact of the defendant's undertaking, given to this Court when he applied for and obtained probate, to administer the estate, such undertaking being at least a most material part of the cause of action in this suit for administration.

Assuming the defendant was at the time of the institution of the suit outside Madras, yet that the application to his case of so much of section 12 as relates to cause of action or part of the cause of action will not be in conflict with International Law, will be seen from what is said in the next paragraph as to the sufficiency of the accrual of the cause of action within Madras to confer jurisdiction over the defendant apart from the Letters Patent.

That independently of the Letters Patent also the decision of the whole question of jurisdiction must be against the defendant is clear from certain passages of the judgment in *Annamalai Chetty v. Murugasa Chetty*(1) decided by the Privy Council after the disposal in favour of the defendant of his appeal in the suit of the testator's daughter alluded to in a previous part hereof. Therein Lord Lindley was dealing with the matter of jurisdiction over a foreigner irrespective of any statutory provision and when he said "that although the defendant was a foreigner, and although the cause of action arose in a foreign country, and

(1) L.R., 30 I.A., 220.

become of the fund, the first defendant having formally repudiated the trust in August 1898. Hence this action against him for malversation and against the other three defendant executors for negligence in not looking to the due performance of the trust.

The learned Judge dismissed the suit as against the first and third defendants on the ground that under section 12 of Letters Patent this Court has no jurisdiction over these defendants, they not being residents of Madras and the whole cause of action not having arisen in Madras, and as against defendants Nos. 2 and 4, who are residents of Madras, on the ground that no specific breach of trust was laid against them. As the third defendant by a petition on the record expressly submitted to the jurisdiction, he should be placed in the same position as defendants Nos. 2 and 4 and the case against these three defendants will be separately dealt with at the end. It is with the first defendant that the plaintiff is mostly concerned. Now, there can be no doubt upon the evidence, as the learned Judge has found, that the first defendant did not reside in Madras at the time of the institution of this suit. The only question for determination, therefore, is whether or not the whole cause of action arose in Madras. A number of decided cases was

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although the defendant did not personally reside within the local limits of the jurisdiction of any Court in British India, and was not even temporarily in Arcot when sued there," he necessarily assumed that among others temporary presence and the accrual of the cause of action within the limits of the Court would each by itself be a ground of jurisdiction according to general principles of English jurisprudence. It is scarcely necessary to say that upon the facts as already found by me above, the presence of the defendant at the time of the suit was part of a stay which was much more than temporary and which even if it were quite temporary made him subject to the jurisdiction of this Court. The case is still clearer in regard to the ground of cause of action, for the affirmation advisedly introduced by Lord Lindley in the said judgment that the case of *Girdhar Damodar v. Kassigar Hiragar*(1) was rightly decided, because the cause of action accrued within Bombay though the defendant was a non-resident foreigner, a native of Cutch, is in so far as this Court is concerned a binding authority in a case like the present. It was with reference to this authority that Sankaran Nair, J., and myself quite recently held in *Tadepalli Subba Rao v. Nawab Sayed Mir Gulam Allikhan*(2) that the Court at Masulipatam had jurisdiction over a non-resident foreigner, a subject of the Nabob of Banganapalle, in respect of a promissory note made payable in Masulipatam. I wish to avail myself of this opportunity to say that in assuming in the last mentioned case that the statement of the law by the Earl of Selborne in *Gurdayal Singh v. Rajah of Faridkote*(3) that the

(1) I.L.R., 17 Bom., 662.

(2) I.L.R., 29 Mad., 69.

(3) (1894) A.C., 670; L.R., 21 I.A., 17 at p. 185; I.L.R., 22 Calc., 222.

cited at the Bar *pro* and *con* in regard to the proposition that the breach of obligation does not constitute the sole cause of action, but that the creation of the obligation has also to be included to make the cause of action complete. So that when only the breach takes place in the jurisdiction of the Court limited to a certain local area, the whole cause of action has not accrued in that area. That seems now to be settled law, the last reported case being *Payne v. Hogg*(1). But this and the other decisions to the like effect dealt with cases of breach of contract. In my opinion it is by no means clear that they are applicable to all or any cases of breach of trust, or especially to such a case as this where the trust may be said to follow the beneficiary and the place of performance be considered as the place where the obligation originates. The place of performance in this case was undoubtedly Madras, where the plaintiff resides, and where the first defendant last paid her the interest. No direction was given in the will that the plaintiff should reside in, or be paid at, any particular place. Her right therefore

(1) (1900), 2 Q.B.D., 43.

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accrual of the cause of action within certain territory did not constitute a ground of jurisdiction over a foreigner not resident at the time of the suit in that territory, was not reconcilable with the conclusion of Lord Lindley that *Girdhar Damodar v. Kassigar Hiragar*(1) was rightly decided, I overlooked the distinction that existed between the two cases in that in *Gurdayal Singh v. Rajah of Faridkote*(2), the question was with reference to the enforcement of a foreign judgment, while, in the Bombay case, the suit was upon the original cause of action itself. Considering that Lord Lindley in his judgment when Master of the Rolls, in *Pemberton v. Hughes*(3) refers to *Gurdayal Singh v. Rajah of Faridkote*(2) with approval, the proper view would seem to be that his conclusion in *Annamalai Chetty v. Murugasa Chetty*(4) as to the Bombay case having been rightly decided is not inconsistent with *Gurdayal Singh v. Rajah of Faridkote*(2) and that the latter lays down the rule to be followed in cases where the question of the validity of a foreign judgment obtained in circumstances such as those which existed in that case comes up for decision in the Courts of this country. Be this as it may, there can be no doubt that the cause of action in the present case which accrued in Madras is of a description which by its very nature makes the defendant liable to the authority of the Court. As pointed out in Wharton on the 'Conflict of Laws,' the tribunal from which an executor takes out letters is that to which he is distinctively amenable (3rd edition, p. 616). See also *Mussamaut Bhanoo Beebee v. Moonshee Hussain Ally*(5) where it was laid down that "it had always been held

(1) I.L.R., 17 Bom., 662.

(2) (1894) A.C., 670; L.R., 21 I.A., 17 at p. 185; I.L.R., 22 Calc., 222.

(3) (1899) 1 Ch.D., 789.

(4) L.R., 30 I.A., 220.

(5) Mort. Dec., 168.

is to be paid wherever she may be so long as the place is within reasonable reach of the trustees or of the active trustee, the first defendant. I am, therefore, of opinion that on this ground alone the whole cause of action arose in Madras. But there are other facts which in combination with the fact of payments of interest being made to the plaintiff in Madras lead me to the conclusion that the whole cause of action arose here. They are, first that the probate of the will creating the trust was taken out from this Court and that the first defendant upon that probate accounted to this Court for this particular trust (paragraph 11 of exhibit B). It was therefore expressly acknowledged by him in Madras. Secondly, that the first defendant repudiated the trust in Madras by a letter sent to the second defendant residing here (see exhibit M). Thirdly, that part of the trust money, viz., Rs. 25,100 referred to above, was misapplied in Madras by being lent to a private individual here (exhibit F) instead of being invested in Government promissory notes.

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that an executor sued in that capacity was subject to the jurisdiction of the Court granting the probate." The present being an action of that character, the defendant's liability to be sued here, cannot be denied.

In conclusion, as regards the actual order made by the learned Judge,—no suit in connection with the administration of the estate in question was ever instituted elsewhere. That part of the property concerned is in Mysore, presents no obstacle to all the administration necessary being carried out under the orders of this Court—*Ewing v. Orr Ewing*(1). And the present case is certainly one in which the administration is sought not for the purpose of merely securing the exoneration of the fiduciaries from the risks and responsibilities of an administration *extra curiam*; and if special cause were necessary for the Court being called upon to undertake a general administration, that has been abundantly shown. The contention of Sir V. Bhashyam Ayyangar that to include in the administration the immoveable property of the testator situated in Mysore would be to pronounce on the title to it, involving, as such inclusion would, the overruling of the defendant's objection as to the incapacity of the testator to will away that portion of the property, is not tenable. For, first, where the Court has jurisdiction to make a grant of probate it has power to decide whether the will is a valid testamentary disposition. See Dicey on 'Conflict of Laws,' rule 64, and comments thereon, pp. 326 and 327. In the next place, no such question of title can in point of law be taken as presented for our decision inasmuch as the

(1) L.R., 10 A.C., 453.

I however record only the above condensed judgment on the question of the cause of action, because I must hold that the first defendant is not subject to our jurisdiction in this personal action, for the reason that he is an alien. That the first defendant is a subject of His Highness the Maharajah of Mysore and a permanent resident of the Bangalore City in the Mysore State and as such a foreigner, is beyond doubt. He asserted his claim at the outset in his affidavit (exhibit U) which has not been answered and it is fully supported by other evidence. He is not dwelling or carrying on business or personally working for gain in Madras (section 12 of the Letters Patent). Therefore, by international law, he is not amenable to the jurisdiction of this Court in a personal action, albeit the whole cause of action arose in Madras, unless he has submitted himself to the jurisdiction. The rule is very clearly laid down by their Lordships of the Judicial Committee in *Gurdial Singh v. Rajah of Faridkote*(1) which was a case wherein the whole cause of action had arisen in the foreign State. I quote the following passage from the judgment: "In a personal action . . . a decree

(1) L.R., 21 I.A., 171 at p. 185; I.L.R., 22 Cal., 222.

defendant having with full knowledge of all the circumstances bearing on his rights as the testator's son, accepted the office of executor, obtained probate and, under its authority collected assets and otherwise so acted as to cause the plaintiffs to alter their position, the defendant is estopped from impeaching the will, repudiating his fiduciary position or setting up in respect of the property dealt with by the will any rights inconsistent with the dispositions and conditions therein. See Bigelow on 'Estoppel,' 5th edition, p. 554. Now in compelling the defendant to perform the trusts this Court is of course acting entirely *in personam*. And *Duder v. Amsterdamsch Trustees, Kantoer*(1) is a direct authority for the view that in such cases this Court has the jurisdiction with regard to any contract made or equities between persons here respecting lands or assets in foreign country, as it has where the lands or assets are locally situate. The law on the point is thus succinctly stated by Westlake:—"A proprietor of foreign immoveables, or person interested in such, may be compelled by the English Court, if it has jurisdiction over him, to dispose of his property or interest in them so as to give effect to any obligation relating to them which arises from, or as from, his own contract or tort; and that obligation will not be measured by the *lex situs* of the foreign immoveables to which it relates, but in accordance with the rules of Private International Law on obligations arising

(1) (1902) 2 Ch.D., 132.

pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it and it must be regarded as a mere nullity by the Courts of every nation, except (when authorized by special local legislation) in the country of the *forum* by which it was pronounced." The "special local legislation" referred to as the exception can never be required to confer jurisdiction in a case where the whole cause of action arises within the jurisdiction as the jurisdiction would follow as a matter of course in such a case. So it must refer to local legislation in respect to the *persons* to be made subject to the jurisdiction such as we have it in the Letters Patent, that is, persons residing or carrying on business and so on within the jurisdiction. The first defendant is not such a person and therefore action against him in no case lies. The only question then left is whether the first defendant has submitted to the jurisdiction of this Court. It is urged by Mr. Kenworthy Brown, for the plaintiff, that the taking out of the probate of the will in this Court with the subsequent liability to account under section 98 of the Probate and Administration Act of 1881 was such a submission but, as is pointed out by Mr Justice Shephard, such obligation as was entailed by taking out the probate has been discharged. Without repeating the learned Judge's reasons I agree with him that the taking out of probate did not amount to a submission by the first defendant to this Court's jurisdiction in the matter of this suit. The decision

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from, or as from, contract or tort. If indeed where the law of the country where the land is situate should not permit, or enable, the defendant to do what the Court would otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment" (and there is none in the present case) "the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities" (4th edition, pp. 210 and 211). As Lord Hershell in *British South Africa Co. v. Companhia de Moc'ambique*(1) points out "if the Courts of a country were to claim, as against a person resident there, jurisdiction to adjudicate upon the title to land in a foreign country, and to enforce its adjudication *in personam*, it is by no means certain that any rule of International Law would be violated. No good objection, therefore, has been shown as to the terms of the order.

I agree, therefore, in holding that the appeal fails and should be dismissed with costs.

M. A. Narasimhachariar—attorney for first respondent.

(1) (1893) A.C., 602 at p. 624.

of the Bombay High Court in *Girdhar Damodar v. Kassigar Hiragar*(1) which was also relied on by the plaintiff's counsel in favour of the contention that a foreigner was liable to its jurisdiction was decided on the express ground that business was carried on by the foreigner within the jurisdiction, and the decision of the same High Court in *Ra'm Ra'vi Ja'mbhekar v. Pralhadas Subkarn*(2) seems to be based on the same ground. But that particular circumstance is wanting here. On the authority, therefore, of the Privy Council above cited, I am of opinion that the plaintiff cannot proceed against the first defendant and I accordingly dismiss the appeal as against him.

As to the other defendants, the second and fourth are residents of Madras and the third has expressly submitted to the jurisdiction of the Court. So, there can be no doubt that as regards them the suit in this Court is not bad for want of jurisdiction. As they are charged with negligence as trustees in not seeing to the due fulfilment of the trust which they have accepted, I think the plaintiff is entitled to proceed against them to enforce the trust money being brought into Court for its due application.

In reversal, therefore, of the decree appealed against, I would order the suit to be restored to the file to be proceeded with according to law against defendants Nos. 2, 3 and 4. I would also allow the appeal in respect to costs and direct that the plaintiff's costs throughout be paid out of the estate of the testator and that the defendants do bear their own costs.

(1) I.L.R., 17 Bom., 662.

(2) I.L.R., 20 Bom., 133.

PRIVY COUNCIL.

RAMANATHAN CHETTI, DEFENDANT,

v.

MURUGAPPA CHETTI, PLAINTIFF.

[On appeal from the High Court of Judicature
at Madras.]

P.C. *
1906.
May 1, 24.

Hindu law—Endowment—Hereditary managers or trustees—Right of management vested by descent in two branches of a family—Relinquishment of right by junior branch to member of senior branch—Alteration thereby of turns of management—Continuous usage by senior branch—Delegation of duties of trustees.

On the death of the sole manager of a Hindu temple and endowed property attached to it, the managership of which was hereditary in his family without any beneficial interest in the endowed property or income, the office devolved on his male descendants by his two wives, there being four in each branch. Until 1881-82 one member of each branch took the management for one year in alternate succession. In 1882 the members of the junior branch relinquished their rights in the management in favour of the plaintiff who was member of the senior branch and for 19 years immediately before suit there had been a settled order of succession amongst the members of the senior branch, the plaintiff in each period of eight years taking five turns (one in his own right and four in the turns of each member of the junior branch), and the other members of the senior branch (of whom the defendant was one) taking one turn each. On the expiration of one of the defendants' turns of management on 13th July 1899 he made over the temple to the plaintiff but retained the endowed property. In a suit brought on 3rd September 1900 to recover possession of it:

Held, by the Judicial Committee (upholding the decisions of the Courts in India) that the unbroken usage during the time the order of succession had continued was conclusive evidence against the defendant of a family arrangement to which the Court was bound to give effect until it was validly altered, or superseded by a new scheme effected with the concurrence of all parties interested. It was one which those parties were competent to make without applying to the Court; and it was not for the defendant at his will and pleasure to disturb an arrangement of which he had on more than one occasion taken the benefit: nor could he in this suit set up the rights of the junior branch against the plaintiff.

The manager of the temple was by virtue of his office the administrator of the property attached to it as regards which he was in the position of a trustee. As regards the service of the temple and the duties appertaining to it he was in

* Present: Lord MACNAGHTEN, Sir ANDREW SCOBLE, Sir ARTHUR WILSON, and Sir ALFRED WILLS.

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the position of the holder of an office or dignity which may have been originally conferred on a single individual, but which in course of time had become vested by descent in more than one person. In such a case in order to avoid confusion it was not unusual, and certainly not improper, for the interested parties to arrange amongst themselves for the due execution of the functions belonging to the office in turns, or in some settled order and sequence. There was no breach of trust in such an arrangement nor any improper delegation of the duties of a trustee.

APPEAL from a judgment and decree (17th August 1903) of the High Court at Madras, which substantially affirmed a decree (30th April 1901) of the Subordinate Judge of Madura (East), and decreed the respondent's suit.

The main question in this appeal related to the right to the management of certain endowed property consisting of a Hindu temple and certain villages assigned for the support of its services. The right to manage the temple in question and the villages endowed for its maintenance was admittedly hereditary in the family of the plaintiff and defendant who were descended from one Mayandi Chetti who was the last sole manager of the endowment. The members of the family had no beneficial interest in the endowed property, being bound to apply the whole of the net profits of it to religious and charitable purposes connected with the worship of the temple deity.

Mayandi Chetti had two wives, and on his death his private property was divided into two portions, one-half being taken by the issue of each of the wives; and an agreement was come to by which the management of the temple and the endowed property was vested in the four members of the senior branch (that is, the descendants of the first wife) and the four members of the junior branch (descendants of the second wife) of the then descendants of Mayandi Chetti. Each branch was given the right to manage for one year, the senior and junior branches managing in alternate years. In 1880 disputes having arisen as to the order in which the members of the senior branch, namely, Chidambaram, Ramanathan (the defendant), Narayan and Murugappa (the plaintiff) should manage, an agreement was made on 14th July 1880 which provided that after excluding the one-half period of the years during which the junior branch should manage the temple Chidambaram should, according to the practice theretofore observed, manage for one year from 14th July 1880, Ramanathan for one year, Murugappa for one year, and Narayan for one year.

In May 1882 the plaintiff alleged that the members of the junior branch relinquished to the plaintiff their rights to manage in the years when the management fell to their turn; and that the agreement thus come to was made with the knowledge and consent of the defendant and was acted on for a long term of years; and for a period considerably more than 12 years prior to the institution of the present suit the plaintiff exercised the right to manage in each of the years in which but for the said agreement each one of the four members of the junior branch would have managed.

In due course the defendant managed from 15th July 1898 to the 13th July 1899. On the expiration of that period the plaintiff was entitled to manage for the next succeeding three years; and the defendant, on the completion of his turn, made over to the plaintiff's agent possession of the temple, the villages, and certain books of account: but disputes arose with regard to the jewels belonging to the temple which the defendant retained; and in consequence of these disputes the defendant again took possession of the villages and books of account, evicted the plaintiff's agent, and denied the plaintiff's right to manage: whereupon on 3rd September 1900 the plaintiff instituted the present suit to recover possession of the villages with mesne profits, and to recover the jewels or their value, and the books of account.

The defendant denied that he had made over possession of the temple and endowed villages to the plaintiff, and asserted that he was in rightful possession thereof and carrying on the religious and charitable work connected with the temple. He also denied that there had been any renunciation of trusteeship in favour of the plaintiff, and submitted that such renunciation, if made, was void and of no effect in law, and that the arrangement by which the management was held for a year by each of the trustees was subject to revocation at the instance of any of them.

The questions now material arising out of the pleadings and issues, were (a) whether a scheme of management was settled by which each branch of the family managed for one year; and whether such scheme was revocable at will? (b) Whether the members of the junior branch of the family delegated their rights to manage to the plaintiff, and to this extent the scheme was validly altered? (c) Whether any claim by the members of the junior branch now to manage was barred by limitation?

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(d) Whether it was open to the defendant to set up the rights, if any, of the junior branch against the plaintiff's claim?

Both Courts decided the suit in favour of the plaintiff. The decision of the High Court (BENSON and BHASHYAM AYYANGAR, JJ.) in which the facts of the case and the findings of the Subordinate Judge are sufficiently stated, is reported in I.L.R., 27 Mad., 194.

On this appeal,

Cohen, K.C., and *W. C. Bonnerjee* for the appellant contended that the Courts in India were in error in holding that the members of the junior branch of the descendants of Mayandi Chetti had not lost their rights to the management of the temple and endowed villages by the operation of the law of limitation. A binding arrangement which excluded the junior branch and substituted the respondent for them could not be validly made. Some of several trustees could not substitute for themselves another person as trustee so as to bind other trustees who objected, and to their exclusion. To do so was to give effect to a transfer of rights without attempting to prove the transfer. To any such arrangement of the turns of management as that now relied on by the respondent the appellant was entitled to object, and this notwithstanding that the members of the junior branch were not represented, and even if their rights were extinguished. The turns by which the trustees exercised the management were, it was submitted, liable to alteration at the will of any of these members, and were not absolutely and permanently binding on them. The Court could not declare that some of the trustees in rotation should, for a definite period, enjoy the right of management, to the exclusion of others. *Sri Raman Lalji Maharaj v. Sri Gopal Lalji Maharaj*(1) was referred to. Here, as in that case, there was no emolument attached to the office of trustee.

Finlay, K.C., and *DeGruyther* for the respondent contended that the scheme in accordance with which the management of the endowment had been apportioned amongst the trustees was a valid one, and not revocable by the will of the appellant. It was open to the members of the junior branch, and not contrary to Hindu Law, to relinquish their rights of management to the respondent, and by that relinquishment the original scheme had been validly altered in a manner which was binding on the

appellant. That arrangement had been in operation for 19 years, and up to the date of suit, and he could not now challenge its operation as being illegal, both because the delegation of their rights by the junior branch to the respondent was valid, and also because it was not open to do so by reason of the provisions of the Limitation Act. Reference was made to *Mancharam v. Pranshankar*(1); Mayne's 'Hindu law,' 6th edition, page 568, para. 439, and page 612, para. 468; *Gossamee Sree Greedhareejee v. Rumaullolljee Gossamee*(2); and *Jagadindra Nath Roy v. Hemanta Kumari Debi*(3). The appellant did not claim for himself any right to management during the three years from 1899 to 1902, and he could not now set up against the respondent the rights of the members of the junior branch of the managers.

Cohen, K.C., replied citing *Sri Raman Lalji Maharaj v. Sri Gopal Lalji Maharaj*(4) and *Trimbak Ramkrishna Ranade v. Lakshman Ramkrishna Ranade*(5).

24th May 1906.—The judgment of their Lordships was delivered by—

LORD MACNAGHTEN.—In the village of Kottoor, in the Zamin-dari of Sivaganga, there is a Hindu temple dedicated to the public worship of the deity in whose honour it was founded, and endowed with the revenue of three villages. The office of manager of this temple is hereditary in a family of which the appellant and respondent are both members, but the family has no beneficial interest in the property or in the income of the temple.

The office of manager was formerly vested in one Mayandi Chetti, who was grandfather of the respondent and great-grandfather of the appellant. On Mayandi's death the office devolved by inheritance on his male descendants by his two wives. There were four by each wife, or eight in all. One member of each branch took the management for one year in alternate succession until the year 1881–82. About that time the members of junior branch renounced or relinquished their claim to the office in favour of the respondent who is a member of the senior branch. During the 19 years immediately preceding the institution of this suit, in

(1) I.L.R., 6 Bom., 298.

(2) L.R., 16 I.A., 187; I.L.R., 17 Cal., 3.

(3) L.R., 31 I.A., 203 (208); I.L.R., 32 Cal., 129 (139).

(4) I.L.R., 19 All., 428 at pp. 432, 433.

(5) I.L.R., 20 Bom., 495 at pp. 499, 500, 501.

(1) I.L.R., 19 All., 428 at pp. 432, 433.

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each cycle of eight years, there has been a settled order of succession among the members of the senior branch. The respondent has had five turns, and the appellant and the other two representatives of the senior branch one turn each.

In accordance with this arrangement the appellant held the office of manager of the temple, and the property belonging to it, from 1st Adi of the year Vilambi (15th July 1898) to 30th Ani of the year Vikari (13th July 1899). On the expiration of that year it was the respondent's turn to hold office for the next three years—one year in his original right and two years in right of the junior branch. The appellant handed over the temple to the respondent, but he kept back the jewels and retained or retook possession of the three villages with which the temple is endowed.

The respondent then brought this suit to recover the jewels and the villages, with mesne profits. The appellant did not dispute the facts alleged by the respondent, but he set up various defences on points of law. Both the Subordinate Judge and the High Court decided against him.

In their Lordships' opinion the case is a very simple one. They think the unbroken usage for a period of 19 years is as against the appellant conclusive evidence of a family arrangement to which the Court is bound to give effect. Twice during that period of 19 years the appellant has, in his proper turn, enjoyed the position of manager for a year. The arrangement seems to have been a perfectly proper arrangement conducing to the due and orderly execution of the office. It was one which the Court would no doubt have sanctioned if its authority had been invoked. It was one which, in their Lordships' opinion, the parties interested were competent to make without applying to the Court. If the appellant wishes to set it aside and to have a new scheme settled, he must take proper proceedings. If he has any ground for attacking the management of the temple or the administration of the property attached to it, the Courts are open. But it is not for him, at his will and pleasure, to disturb an arrangement of which he has on more than one occasion taken the benefit. It is plain that the arrangement was not intended to be merely temporary, nor can it be regarded as precarious. It must hold good until altered by the Court or superseded by a new scheme effected with the concurrence of all parties interested.

The argument on behalf of the appellant seems to have been founded on a mistaken analogy. The manager of the temple is by virtue of his office the administrator of the property attached to it. As regards the property the manager is in the position of a trustee. But as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity which may have been originally conferred on a single individual, but which, in course of time, has become vested by descent in more than one person. In such a case, in order to avoid confusion or an unseemly scramble, it is not unusual, and it is certainly not improper, for the parties interested to arrange among themselves for the due execution of the functions belonging to the office in turn or in some settled order and sequence. There is no breach of trust in such an arrangement nor any improper delegation of the duties of a trustee.

The members of the junior branch are not before the Court. Their rights, if they have any, are not affected by this suit. The appellant cannot be allowed to put himself forward as their champion to disturb an arrangement with which they seem to be quite content.

Their Lordships will humbly advise His Majesty that the appeal must be dismissed. The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: *Sanderson, Adkin, Lee D. Eddis.*

Solicitor for the respondent: *Douglas Grant.*

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APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, and Mr. Justice
Subrahmania Ayyar.*

1906.
January 3.

CAMANI (FOURTH COUNTER-PETITIONER), APPELLANT,

v.

THE ADMINISTRATOR-GENERAL OF MADRAS AND TWO
OTHERS (PETITIONER AND COUNTER-PETITIONERS
Nos. 1 TO 3), RESPONDENTS.*

*Will, construction of—Fund specified, liable for debts and expenses even when there
is a residue undisposed of.*

Where a will directs that the funeral and testamentary expenses should be paid out of a legacy but makes no disposition of the residuary estate, such expenses will nevertheless be payable out of the fund specified and the fact that the testatrix at the time she made the will was not aware that she had a residue to dispose of, will not justify the Court in speculating upon what she would or might have done had she been aware of it, and departing from the express directions of the will, to make a new will for her.

This appeal arose out of an application by the Administrator-General in regard to certain provisions in the will of the deceased Mrs. Barefoot.

The provisions of the said will were as follows:—

(a) That all ready money and cash standing to her credit in current account with Messrs. Arbuthnot & Co., or which may be otherwise invested in her sole name alone should be taken by her daughter the said Mrs. F. D. Camani absolutely after payment thereout, of all her, Mrs. Matilda Barefoot's just debts and funeral and testamentary expenses.

(b) That the two houses known as silver Oakes and Valintine cottage belonging to her in Bangalore, together with all household furniture therein, should be sold and the nett proceeds of such sale equally divided between the said James Joseph Barefoot and Cornelius Aaron Barefoot and Mrs. F. D. Camani her children.

(c) That all jewels and trinkets belonging to her should be distributed between her said children in accordance with certain lists entered by her in a book.

* Original Side Appeal No. 9 of 1904, presented against the judgment of Mr. Justice Moore, dated the 15th December 1903, in the Original Testamentary jurisdiction of this Court.

(d) That a sum of Rs. 100 should be paid into a Bank for the benefit of her grandson James Cornelius Barefoot.

There was no disposition of any residuary estate and, at the time of making her will, Mrs. Barefoot was not aware that she was entitled to a sum of Rs. 38,000 and odd as her share of a bequest to her son James Barefoot by her husband, which bequest was subsequently held to be void by reason of James having attested his father's will. It was contended by Mrs. F. D. Camani among other things, that although by clause (a) aforesaid of the will, the legacy to her was charged with the payment of debts and testamentary expenses, the residuary estate was primarily liable.

This contention was disallowed by Moore, J., who held that the fund specified was liable.

Mrs. Camani preferred this appeal.

Mr. Nugent Grant for appellant.

Mr. John Adam for second and third respondents.

JUDGMENT.—The question we have to decide is whether the funeral and testamentary expenses of Mrs. Barefoot should be paid out of the legacy bequeathed by her to her daughter, or out of Mrs. Barefoot's residuary estate. By her will Mrs. Barefoot directed that these expenses should be paid out of the legacy. At the time she made her will she was unaware that she was entitled to a sum of Rs. 38,000 being her share of a bequest to her son James Barefoot by her husband under his will which bequest was subsequently held to be void by reason of James having attested his father's will. The rule as laid down in Theobald on 'Wills' is as follows:—

"It would seem, that if no disposition of the residuary estate is attempted, the proper inference is, that the specific fund is operated for the benefit of the next of kin, and that it and not the residue undisposed of is the primary fund for payment of debts and legacies. See *Milnes v. Slater*(1), *Dacre v. Patrickson*(2), *In re Grainger*; *Dawson v. Higgins*(3)." We think the present case falls within the rule as laid down by Mr. Theobald and not within the exceptions to which the learned author refers. No doubt it may be said that if Mrs. Barefoot had been aware that she had residuary estate to dispose of she might not have directed that her

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TRATOR-
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(1) 8 Ves., 295.

(2) 1 Dr. & Sm., 186.

(3) (1900), 2 Ch., 775.

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GENERAL OF
MADRAS.

testamentary and funeral expenses should be paid out of the specific bequest. But we are not entitled to speculate as to what the testatrix would or might have done and in effect make a new will for her. We must give effect to the express directions in the will. This appeal is dismissed with costs.

Mr. James Short, attorney for appellant.

Mr. A. E. Rencontre, attorney for respondent.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

1906.
January 18.

SABAPATHY MUDALIAR (DEFENDANT), APPELLANT,

v.

SEETHARAMIAH AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Copyright Act XX of 1847, s. 14—Act XXV of 1867—Law under section 14 of Act XX of 1847 same as law in England. No copyright in published work except where copyright registered and subsists.

The law as settled in England is that in the case of a book which has been published, there is no right to sue for piracy except where the copyright is registered and subsists under statutory provisions.

Copinger on 'Copyright,' pages 29 and 33, referred to.

Macklin v. Richardson and Goubaud v. Wallace, (7 Ruling Cases, 66 at pp. 67, 70 and 128 respectively), referred to.

The law is the same in India.

The proviso to section 14 of Act XX of 1847 has not effected any change in the law as stated above and does not protect copyright in published works when not registered under Act XX of 1847 or Act XXV of 1867.

Macmillan v. Suresh Chunder Deb, (I.L.R., 17 Cal., 951), distinguished.

Suit for damages for infringement of copyright and an injunction.

The plaintiffs were the proprietors and authors of the calendars called 'Sarva Mochoortha Panchangam' which they have been publishing and selling every year since 1902. Prior to 1902, first and second plaintiffs alone were the proprietors and authors. Defendant was the proprietor of a press called the 'Chandrica Press' where the calendar for 1903 was printed for the plaintiffs. In 1904

* City Civil Court Appeal No. 4 of 1905, presented against the decree of M.R. By. C. Jambulingam Mudaliar, City Civil Court Judge, Madras, in Original Suit No. 100 of 1904.

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v.
SEETHA-
RAMIAH.

plaintiffs printed their book elsewhere. The defendant printed a book for the same year with the name 'Sarva Mochoortha Ganitha Panchangam' and was selling the same on his own account. The plaintiffs' book contained, besides the panchangam or calendar portion, original matter which was the result of their personal skill and labour. The plaintiffs alleged that the defendant had copied several original portions in his calendar from the calendar of the plaintiffs and had thus infringed their copyright. The plaintiffs estimated the loss sustained by them owing to the action of the defendant at Rs. 250. The plaintiff further charged that the defendant also infringed the plaintiffs' trade mark which was registered in the Chamber of Commerce. The plaintiffs therefore prayed for an injunction and damages.

The defendant pleaded *inter alia* that the plaintiffs had not obtained the copyright, and that the publication was not capable of being registered under the Copyright Act 25 of 1867.

The City Civil Judge passed a decree in favour of the plaintiff. Defendant preferred this appeal.

Mr. John Adam and T. Pattabhirama Ayyar for appellant.

C. Venkatasubbaramiah for respondents.

JUDGMENT.—Mr. John Adam has argued the question arising in this case fully, and has drawn our attention to all the authorities bearing on it. Except the case (*Macmillan v. Suresh Chunder Deb*(1), all the other cases are English authorities. The result of them is that in the case of a book which has been published there is no right to sue on account of piracy, except where the copyright has been registered and subsists under statutory provisions (Copinger on 'Copyright,' pages 29 to 33 and *Macklin v. Richardson* and *Goubaud v. Wallace*(2)).

In the present case the plaintiff's almanac was not registered under Act XX of 1847, nor under Act XXV of 1867, which would be equivalent to registration under the Act of 1847.

No doubt the plaintiff applied for registration under the Act of 1867, but the Registrar refused to register on the ground that the almanac was exempted from registration by notification of the Government of India, dated December 1871, under section 21 of the Act. It is argued for the plaintiffs that this is equivalent to

(1) I.L.R., 17 Cal., 951.

(2) 7 Ruling Cases, 66 at pp. 67, 70 and 128, respectively.

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registration, but we cannot accede to this contention. It is next urged that having regard to the language of the proviso to section 14 of Act XX of 1847, the law in this country must be taken to be different from that accepted as the law of England subsequent to the decision of the House of Lords which settled it (*Jefferys v. Boosay*(1)). In our opinion, however, the proviso in the Indian Act does not, in substance, differ from the proviso in the English Act (5 & 6 Vic., ch. 45, section 24). The effect of it is to protect copyright in unpublished works as also copyright where there is registry under the statute in the case of published works inclusive of cases in which there has been registry before the suit, though after the infringement complained of. The Calcutta case on which the Judge relies is not in conflict with our view for the work was in that case registered prior to the filing of the suit.

It follows that the plaintiff's suit was unsustainable. We therefore reverse the decree of the Judge and dismiss the suit. Having regard, however, to the fact that the plaintiff asked for registration and was, as far as we can judge, improperly refused, we direct that each party bear his own costs throughout.

APPELLATE CIVIL.

Before Mr. Justice S. Subrahmania Ayyar and Mr. Justice Benson.

1906.
January 22.

YELUMALAI CHETTI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

SRINIVASA CHETTI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 244, 318—Purchaser of undivided share must sue for partition by separate suit—Section 244 no bar to such suit.

The purchaser at a Court sale of the share of an undivided member of a joint Hindu family acquires only a right to sue for partition and for delivery of what may be allotted as the share of such undivided member. The Court cannot on a mere application for execution by such purchaser enforce his right by an order for partition. No such order can be made under section 318 of the Code of Civil

(1) 4 H.L., 815.

* City Civil Court Appeal No. 22 of 1905, presented against the decree of M.R.Ry. C. Jambulingam Mudaliar, City Civil Court Judge, Madras, in Original Suit No. 173 of 1904.

Procedure and the dismissal by the Court of an application by the purchaser under section 318 cannot be a bar to a suit by the purchaser for partition.

Section 244 of the Code of Civil Procedure is no bar to such a suit.

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v.
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CHETTI.

FIRST plaintiff sued to recover possession of the plaint property basing his claim to one-half of it on a private sale-deed executed by first defendant in his favour on 13th August 1902 for a consideration of Rs. 1,100, and as to the other half on a sale-certificate in favour of first and second plaintiffs granted to them in pursuance of a Court sale by public auction held on 2nd January 1899 in execution of the decree in Suit No. 5483 of 1897 on the file of the Madras Court of Small Causes.

Second defendant pleaded that the suit was barred under section 244 of the Code of Civil Procedure, inasmuch as the application by the plaintiffs under section 318, Civil Procedure Code to be put in possession of the property purchased at the auction sale was dismissed as being barred by limitation, and plaintiffs had not preferred an appeal against that decision.

The lower Court held that the suit as against the second defendant was barred by the rule of *res judicata* and by limitation.

Plaintiff preferred this appeal.

V. Krishnaswami Ayyar and *V. Visvanatha Sastri* for appellants.

M. Thangavelu Chettiar for second to fifth respondent.

JUDGMENT.—The facts of the case are as follows:—In execution of a decree for money obtained against the second defendant who is the father of defendants Nos. 3 to 5 and the undivided brother of the first defendant, the plaintiffs purchased the undivided half share of the second defendant in the house in dispute. Subsequently the first plaintiff purchased the first defendant's share also. The present suit is to recover possession of the entire house. In so far as the second defendant's share was concerned the suit was dismissed on the ground that the proper remedy was by execution of the decree under section 244, Civil Procedure Code. This view is not sustainable. The only right acquired by the Court sale against the second defendant was a right to effectuate the sale by a suit for partition of the joint property of the co-parceners and the delivery to the plaintiffs of what might be allotted to the share of the second defendant at the partition.

It was not competent to the Court in the circumstances of this case, on a mere application for execution by the purchaser, to enforce the right of the purchaser by an order for partition.

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v.
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CHETTI.

Consequently no orders of the kind contemplated by section 318, Civil Procedure Code, could have been passed in favour of the plaintiffs in the circumstances of this case. It follows that section 244 could not have been a bar to a suit brought by these plaintiffs for partition. The order therefore relied on by the Judge dismissing the application for the so-called delivery under section 318 does not affect the case. As after the purchase of the first defendant's right the first plaintiff became entitled to the whole house against both the co-parceners whose rights had passed to him the decree dismissing the suit as against the second defendant is wrong. His sons, defendants Nos. 3 to 5, are bound by the sale against their father, no case as to the nature of the debt entitling them to question the sale having been put forward.

We therefore modify the decree of the Judge by allowing the plaintiffs' claim in its entirety with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

1905.
December 6.

NAMBIAMUTTIL POKKER (PLAINTIFF), APPELLANT,

v.

KITHAKKI KUNHIPATUMMA AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Malabar Law—Karnavan right of, to sue member in possession for maintenance.

Where properties of a Tavazhi are in the possession of a member other than the Karnavan, the latter cannot sue such member for maintenance but only for possession of such properties.

Suit for maintenance. The plaintiff alleged that the plaintiff properties items 1 to 65 belonged to a Tavazhi consisting of himself and the defendants. He alleged that the first defendant, who was a female, was in possession of some of the Tavazhi properties as the managing member of the Tavazhi and having paid for his maintenance for some time discontinued doing

* Second Appeal No. 1005 of 1903, presented against the decree of M.R.Ry. M. Achutan Nair, Subordinate Judge of North Malabar, in Appeal Suit No. 208 of 1901, presented against the decree of M.R.Ry. V. S. Krishna Ayyar, Acting District Munsif of Panur, in Original Suit No. 82 of 1900.

so. The first defendant contended that she was in possession of items 1 to 12 and 65 only, and these she claimed as her sole property to which the Tavazhi had no right. She denied that she ever gave maintenance to the plaintiff or that he was entitled to claim maintenance from her.

The District Munsif held that the suit was a speculative one brought to test the claim of the Tavazhi to items 1 to 12 and 65. He also held that if the properties were Tavazhi property, the liability to maintain rested with the Karnavan, who was the senior male member of the family and if the Karnavan neglected to take possession of such properties which were chargeable with maintenance and the party in possession refused to maintain an Anandravan, the remedy of such Anandravan was to sue for possession of such properties and not for maintenance. On the allegations in the plaint the plaintiff himself was the Karnavan of the Tavazhi. His suit was dismissed by the Munsif as he sued only for possession and not for maintenance. On appeal by the plaintiff, the judgment of the Munsif was confirmed.

Plaintiff preferred this second appeal.

J. L. Rosario for appellant.

Mr. T. Richmond for first respondent.

JUDGMENT.—It is clear that this suit as now brought is not maintainable. The plaintiff's case is that he is the nephew (sister's son) of the first defendant and that there is certain property in her possession which, as a matter of fact, belongs to the Tavazhi of which the first defendant and he are members. Granting for the sake of argument that the plaintiff's contentions are true he should have sued as Karnavan of the Tavazhi for the recovery of the property that he alleges belongs to the Tavazhi. A suit brought by the Karnavan for maintenance against a member of the Tavazhi is not maintainable. On this ground we are of opinion that this suit was properly dismissed and we accordingly dismiss this second appeal with costs.

NAMBIAMUTTIL
POKKER
v.
KITHAKKI
KUNHI-
PATUMMA.

APPELLATE CIVIL.

*Before Sir Arnold White, Chief Justice, and Mr. Justice
Subrahmania Ayyar.*

CHAKKA SUBBIAH (FIRST DEFENDANT), APPELLANT,

v.

MADDALI LAKSHMINARAYANA AND ANOTHER
(FIRST PLAINTIFF AND SECOND DEFENDANT),
RESPONDENTS.*

Declaratory decree—Not to be given when suit is for cancellation and when no consequential relief prayed.

A suit for cancellation of a mortgage-deed on the ground of fraud must be dismissed in the absence of evidence of fraud and a decree declaring plaintiff's right to a smaller amount cannot be made when at the date of the plaint the plaintiff was entitled to consequential relief which he failed to claim.

SUIT to set aside a mortgage-deed for Rs. 300, dated 15th April 1901, executed by the first plaintiff in favour of the first defendant and registered on 16th April 1901, as null and void, on the ground that it was obtained fraudulently and without consideration.

Issues 1 and 2 were—

- (1) Is the suit bond not supported by consideration.
- (2) Was it executed under the circumstances alleged in the plaint.

The District Munsif found that the suit bond was not proved to be unsupported by consideration, and on the second issue, that no circumstances were proved to have existed so as to invalidate the suit bond.

He dismissed the plaintiff's suit.

The plaintiff appealed.

The material portion of the Subordinate Judge's judgment is as follows:—

"All circumstances put together and anxiously considered drive me to the conclusion that the suit mortgage-deed has had no consideration to the extent of Rs. 170 and the rest was paid to or for the first plaintiff.

* Second Appeal No. 2477 of 1903, presented against the decree of M.R.By. I. L. Narayana Rao, Subordinate Judge of Kistna at Masulipatam, in Appeal Suit No. 147 of 1903, presented against the decree of M.R.By. K. Sundaram Chetty, District Munsif of Bezvada, in Original Suit No. 194 of 1901.

In the result I shall modify the decree of the lower Court and adjudge that the suit mortgage-deed has had no consideration to the extent of only Rs. 170 and that each party will bear his or their own costs in both Courts."

First defendant preferred this second appeal.

C. Ramachandra Rau Saheb for appellant.

P. Nagabhushanam for first respondent.

JUDGMENT.—The plaintiff (the mortgagor) sued for the cancellation of a mortgage-deed on the ground of fraud.

The Court of First Instance held that there was no fraud and dismissed the suit. The lower Appellate Court also held that there was no fraud but in effect made a declaration in the plaintiff's favour that the mortgage-deed was not a security for Rs. 300 but only for Rs. 130. As the lower Appellate Court found no fraud it ought to have affirmed the decree of the Court of First Instance dismissing the suit.

The lower Appellate Court appears to have thought it open to treat the suit as one for a declaration; but as at the date of the suit, according to the view taken by the lower Appellate Court, the plaintiff was entitled to consequential relief and failed to claim this relief, the declaration cannot be upheld. We set aside the decree of the lower Appellate Court and restore that of the District Munsif. We make no order as to costs.

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SUBBIAH
v.
MADDALI
LAKSHMI-
NARAYANA

APPELLATE CIVIL.

*Before Mr. Justice Benson and Mr. Justice Moore.*1905.
December 4.

RENGASAWMY NAICKEN (FIRST DEFENDANT), APPELLANT,

v.

GANGAMMAL AND OTHERS (PLAINTIFF AND DEFENDANTS
Nos. 2 AND 3), RESPONDENTS.**Grant, construction of.—Mention of a person as heir of grantee confers
no interest on such person.*

Where a deed of grant to a widow recites that she has no other heirs than her daughter, and that the lands shall belong to such daughter at her death, the grant is not to be construed as a grant to the widow and her daughter. The grant is absolute and to the widow alone, the daughter taking no interest under it.

THE plaintiff's case was that plaintiff and defendants Nos. 2 and 3 were sisters: that their father Kopini Venkata Naiken had an undivided brother Kopini Subba Naiken; that Kopini Subba Naiken died about 40 years ago, leaving his widow Nagammal and a daughter Vengilammal; that plaintiff's father Kopini Venkata Naiken left the said properties to Nagammal to be enjoyed by her during her lifetime; that Nagammal enjoyed those properties and died about five years ago; that Nagammal's daughter Vengilammal's and Vengilammal's daughter and son predeceased Nagammal; that as first defendant had married Nagammal's daughter Vengilammal he, as the agent and trustee, managed the affairs of Nagammal; that plaintiff's father Venkata Naiken and her mother Velammal died about 20 and 15 years ago, respectively; that after Nagammal's death plaintiff and defendants Nos. 2 and 3 became the sole owners of the said properties; that in spite of plaintiff's repeated demands to put plaintiff and defendants Nos. 2 and 3 in possession of those properties, first defendant has been unlawfully enjoying them questioning the title of the plaintiff and defendants Nos. 2 and 3 thereto.

The plaintiff sued for possession of the properties and mesne profits.

* Second Appeal No. 1038 of 1903, presented against the decree of Vernor A. Brodie, Esq., District Judge of Coimbatore, in Appeal Suit No. 182 of 1902, presented against the decree of M.R.By. K. Krishnamachariar, District Munsif of Udumalpet, in Original Suit No. 1032 of 1901.

The first defendant contended *inter alia* that Venkata Naiken was not the owner of the suit properties; that he did not give them to Nagammal to be enjoyed by her during her lifetime; that plaintiff's father Venkata Naiken and Nagammal's husband Subba Naiken became divided and acquired certain properties in common; that Subba Naiken died subsequently, i.e., about 50 years ago; that on Nagammal's demand for separate possession of her husband's share of those properties, Venkata Naiken gave her the entire properties items 1, 3 and 4 and also the southern part of item 24.78 acres in extent on 27th November 1850; that he also executed to her on the same day a release in respect thereof; that Nagammal became therefore entitled to those properties; that as Venkata Naiken clearly stated in the release that neither he nor his heirs can set up any title to the properties set forth therein and that they have been absolutely given to Nagammal, neither Venkata Naiken nor any of his heirs can now set up any title thereto; that Nagammal having enjoyed those properties gave them orally, about 30 years ago, to her daughter Vengilammal and daughter's husband, first defendant, at their marriage, and put them in immediate possession thereof; that the first defendant has been enjoying them absolutely since then.

The material portion of exhibit III, the release deed referred to by the first defendant was as follows:—

Partition Karar, dated 14th Karthigai of Satharana (27th November 1850) executed and given by (me) Venkata Naiken, son of Pusari Velappa Naiken, residing in Jallipatti, to my younger brother's wife Nagammal, residing in the said village.

Myself and your husband Subba Naiken have, with difficulty and at our expenses, acquired fields, garden and adinam well, etc. Your husband is dead and you have no male issue but have one daughter.

The above said fields, cattle, house and site shall belong to you alone and neither myself nor my Ullittar shall have any right to or connection with them. After your life the said lands, cattle and house shall belong to your daughter Venkatammal.

The District Munsif dismissed the plaintiff's suit.

The District Judge on appeal passed a decree for a part of her claim.

The first defendant appealed to the High Court.

RENGASAWMY
MAIGER
v.
GANGAMMAL.

The substantial question involved in the second appeal was the nature of the right of Nagammal under exhibit III.

The Hon. Mr. P. S. Sivaswami Ayyar for appellant.

T. V. Seshagiri Ayyar for first respondent.

JUDGMENT.—We think that exhibit III evidences an absolute grant to the widow alone in satisfaction of all her claims. There is no grant to her daughter, who is referred to merely as her heir in the ordinary course, and to show that on the death of the widow, the grantor and his branch of the family shall have no claim to the land. The widow having survived her daughter, the latter never acquired any interest in the land nor did her husband, the appellant. In this view the appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

1906.
January 4.

PERIA KARUPPAN AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

VELAYUTHAM CHETTI AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Parties, joinder of—Persons jointly interested with plaintiff may be made defendants without proof that they refused to join as plaintiffs.

Where some only out of several persons jointly interested in a cause of action bring a suit impleading the others as defendants, such suit is sustainable though it is not shown that the parties joined as defendants refused to join as plaintiffs.

Pyari Mohun Bose v. Kedarnath Roy, (I.L.R., 26 Cal., 409), followed.

Biri Singh v. Nawal Singh, (I.L.R., 24 All., 226), followed.

Suit to recover the amount due on a promissory note executed by the first defendant in favour of the plaintiffs and the fifth defendant. The first defendant pleaded *inter alia* that the suit was bad for non-joinder of the fifth defendant as a plaintiff.

* Second Appeal No. 4 of 1904, presented against the decree of H. Moberly, Esq., District Judge of Madura, in Appeal Suit No. 13 of 1903, presented against the decree of M.R.By. V. R. Kuppuswamy Ayyar, District Munsif of Sivaganga, in Original Suit No. 230 of 1901.

The District Munsif upheld this objection and dismissed the suit. His judgment was confirmed on appeal by the District Judge.

Plaintiffs preferred this second appeal.

K. Srinivasa Ayyangar for P. R. Sundara Ayyar for appellants.

The Hon. Mr. P. S. Sivaswami Ayyar for first respondent.

JUDGMENT.—We think this suit must be regarded as a suit on a promissory note executed in favour of plaintiffs Nos. 1 and 2 and Thambisamia Pillai. We do not think the suit ought to have been dismissed on the ground that Thambisamia Pillai had been improperly made a defendant since it was not shown that he had refused to be made a plaintiff. We agree with the decisions of the Full Bench of the Calcutta High Court in *Pyari Mohun Bose v. Kedarnath Roy*(1), and of the Allahabad High Court in *Biri Singh v. Nawal Singh*(2), and we are prepared to follow them. The decisions of the lower Courts dismissing the suit must be set aside, and the case must go back for disposal according to law. The costs of this appeal and costs in the lower Appellate Court will abide the event.

PERIA
KARUPPAN
v.
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CHETTI.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

THIRUVENGADATHIENGAR AND OTHERS (PLAINTIFF AND
HIS LEGAL REPRESENTATIVES), APPELLANTS,

v.

VAIDINATHA AYYAR AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

1905.
November
22, 23.

Civil Procedure Code—Act XIV of 1882, ss. 525, 520, 526—Order to file or refusing an application to file an award appealable—Award determining matters not referred cannot be filed.

An order made on an application under section 525 of the Code of Civil Procedure to file an award, whether such prayer is granted or refused, is a decree and appealable as such.

(1) I.L.R., 26 Cal., 409.

(2) I.L.R., 24 All., 226.

* Second Appeal No. 889 of 1903, presented against the decree of M.R.By. N. Sarvothama Rao, Subordinate Judge of Tanjore, in Appeal Suit No. 431 of 1899, presented against the decree of M.R.By. B. Veeraswamiiah, District Munsif of Mannargudi, in Original Suit No. 179 of 1898.

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DATHIENGAR
v.
VAIDINATHA
AYYAR.

Ponnusami Mudali v. Mandi Sundara Mudali, (I.L.R., 27 Mad., 255), followed.
Where an award determines matters not referred to arbitration, the Court, under sections 520 and 526 of the Code of Civil Procedure, is bound to refuse to file the award.

THIS appeal arose out of an application by the plaintiff (appellant) under section 525 of the Code of Civil Procedure to file an award made in accordance with a muchilika executed by the plaintiff and defendants to settle certain disputes in respect of their lands. The defendants raised various objections to the award and among others, that the arbitrator had decided matters not referred to him for arbitration. The western boundary of item No. 2 referred to in the muchilika was stated as belonging to the plaintiff, whereas in the award the western boundary was stated to be a channel. The effect of this was to give the land between the channel and the plaintiff's land, some 20 gulies, which did not form part of the matter referred, to the plaintiff. Similar objections were taken by the defendants to some other items.

The District Munsif considered that the award was not thereby vitiated and ordered it to be filed. On appeal the Subordinate Judge considered that the error made by the arbitrator with regard to item No. 2 vitiated the award and overruling the objection of the plaintiff that no appeal lay against the order, reversed the decision of the Munsif.

Plaintiff preferred this second appeal.

V. Krishnaswami Ayyar and *S. Srinivasa Ayyar* for second and third appellants.

The Hon. Mr. P. S. Sivaswami Ayyar for first respondent.

R. Kuppuswami Ayyar for second respondent.

JUDGMENT.—It has been urged here that no appeal lay to the Subordinate Judge from the order of the District Munsif directing the award to be filed. The decision, however, of the Full Bench of this Court in *Ponnusami Mudali v. Mandisundara Mudali*(1) removes any doubt that there might be as to this. It is there held following the decision of the Privy Council in *Ghulam Jilani v. Muhammad Hussan*(2) that an order made on an application to file an award under section 525 of the Civil Procedure Code would seem to be a decree within the meaning of that expression as defined by the Civil Procedure Code. It is therefore clear that when an

(1) I.L.R., 27 Mad., 255.

(2) L.R., 29 I.A., 51.

application is made to a Court to file an award, an order granting the prayer and an order refusing the prayer are both decrees. We must hold that there was an appeal to the Subordinate Judge. The Subordinate Judge has found that the award has determined a matter not referred to arbitration. If this can be shown to be the case it follows that, under the provisions of sections 520 and 526 of the Civil Procedure Code, the Subordinate Judge was bound to refuse to file the award. It is shown that in the two muchilikas in which the parties referred the matter in dispute between them to the arbitrator the western boundary of the land in dispute is stated to be certain land belonging to the plaintiff. The arbitrator, however, in the award altered this and mentioned a certain channel as the western boundary. This he was clearly not entitled to do. The result is that he has decided the right to some 20 gulies of land regarding which no reference was made to him. Such being the case we are of opinion that the Subordinate Judge was bound to refuse to allow the award to be filed and we accordingly dismiss this second appeal with costs.

THIRUVENGA-
DATHIENGAR
v.
VAIDINATHA
AYYAR.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmania Ayyar.

RAMAKRISHNA AYYAR AND ANOTHER (PLAINTIFFS Nos. 2 AND 3), APPELLANTS,

1908.
December 21.

v.

SUBRAHMANIA AYYEN AND OTHERS (DEFENDANTS Nos. 1 TO 11), RESPONDENTS.*

Transfer of Property Act IV of 1882, s. 55—Limitation Act XV of 1877, sch. II, arts. 132, 111—Article 132 applies to suits to enforce the charge created by s. 55 of the Transfer of Property Act.

The statutory charge which an unpaid vendor obtains under section 55 of the Transfer of Property Act is different in its origin and nature from the vendor's lien given by English Courts of Equity to an unpaid vendor.

* Second Appeal No. 2543 of 1903, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 962 of 1902, presented against the decree of Syed Tajuddin Sahib, District Munsif of Negapatam, in Original Suit No. 451 of 1900.

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Webb v. Macpherson, (I.L.R., 31 Calc., 57), referred to and applied.
The article of the Limitation Act applicable to a suit to enforce such charge is article 132 of schedule II and not article 111.
Natesan Chetti v. Soundararaja Ayyangar, (I.L.R., 21 Mad., 141), overruled.
Avuthala v. Dayumma, (I.L.R., 24 Mad., 233), overruled.
Subrahmania Ayyar v. Poovan, (I.L.R., 27 Mad., 28), overruled.

THE facts were that the plaintiff owned the lands in schedule A : one Subrahmania Ayyar had a mortgage on them, and four items of land in schedule B. To discharge it, plaintiff sold the whole of B schedule to first defendant's father (who was succeeded by first defendant) for a small sum in cash, and an undertaking to pay off various debts including that due to Subrahmania Ayyar. The lands were eventually resold, and came through the hands of second and third defendants into the hands of the other defendants as their vendees, only a portion of Subrahmania Ayyar's debt having been paid. Eventually to save the lands in schedule A from sale for which Subrahmania Ayyer sued, plaintiff paid him the amount due on the mortgage. He now sued to recover it from the defendants, or by sale of the lands in their hands.

Both the lower Courts held that the suit was barred under article 111 of schedule I of the Limitation Act.

Plaintiffs Nos. 2 and 3 preferred this second appeal.

T. R. Ramachandra Ayyar and *G. S. Ramachandra Ayyar* for appellants.

The Hon. Mr. P. S. Sivaswami Ayyar for third to seventh respondents.

K. S. Ramaswami Sastri for second respondent.

JUDGMENT.—On the authority of the judgment of the Privy Council in *Webb v. Macpherson*(1) which is since the decision of the lower Appellate Court in this case, we must hold that the District Judge was wrong in his view that the case was governed by article 111 of the schedule to the Limitation Act. It is pointed out in the judgment of the Privy Council that the charge which a vendor obtains under section 55 of the Transfer of Property Act is different in its origin and nature from the vendor's lien given by English Courts of Equity to an unpaid vendor. The charge in the present case is not the vendor's lien contemplated by article 111, but the statutory charge which arises by virtue of the

(1) I.L.R., 31 Calc., 57.

provisions of section 55 of the Transfer of Property Act. The article applicable is article 132 and not article 111 and the suit is not barred by limitation. It was argued by the respondents that if this be the right view, no case could arise to which article 111 would be applicable. This may or may not be so. For the purpose of the present case it is enough for us to hold that the period of limitation in this case is twelve years from the date of the sale. Having regard to the decision of the Privy Council it would seem that *Natesan Chetti v. Soundararaja Ayyangar*(1), *Avuthala v. Dayumma*(2), and *Subrahmania Ayyar v. Poovan*(3), can no longer be regarded as binding authorities in so far as this point is concerned. We must set aside the decrees of the lower Courts. There will be the usual decree for sale for Rs. 900 with interest at six per cent. per annum from the date of plaint to the date of payment with proportionate costs out of the sale-proceeds of the properties in schedule B. The respondents will bear their own costs throughout.

The time for payment will be three months from this date.

APPELLATE CIVIL.

Before Mr. Justice Boddam and Mr. Justice Moore.

UTHANDI MUDALI (FIRST DEFENDANT), APPELLANT,

v.

RAGAVACHARI AND OTHERS (PLAINTIFF AND DEFENDANTS
Nos. 2 TO 4), RESPONDENTS.*

Mortgage—Whether sale followed by agreement to reconvey amounts to—Contract creating personal right not transferable.

Three brothers sold certain properties by a duly executed sale-deed. The vendee, more than two months after the sale, executed an agreement in favour of one of them in the following terms:—

"You shall, on 29th January 1901, without obtaining from others and by your own earnings, pay me the sum of Rs. 350 and obtain the right of purchase from

(1) I.L.R., 21 Mad., 141.

(3) I.L.R., 27 Mad., 28.

(2) I.L.R., 24 Mad., 233.

* Second Appeal No. 1058 of 1903, presented against the decree of K. C. Manavedan Raja, Esq., District Judge of North Arcot, in Appeal Suit No. 2 of 1903, presented against the decree of M.E.Ry. V. Ranga Rau, District Munsif of Chittoor, in Original Suit No. 93 of 1901.

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me in respect of the lands sold. If you do not pay the amount on that date you shall have no right whatever."

The plaintiff having obtained the assignment of the right under the agreement, sued to recover possession on payment of the amount, alleging that the sale-deed and agreement taken together amounted to a mortgage:

Held, that the sale-deed and agreement not being between the same parties and being independent transactions could not be construed as constituting a mortgage.

Situl Pershad v. Luchmi Pershad Singh, (L.R., 10 I.A., 129), followed.

Held also, that the right conferred by the agreement was personal and not transferable.

THE facts necessary for this report are set out in the judgment.

K. Srinivasa Ayyangar for appellant.

T. R. Ramachandra Ayyar for *V. Krishnaswami Ayyar* for first respondent.

JUDGMENT.—We think this decree cannot be supported. The defendants Nos. 2 to 4 sold certain property to the first defendant under exhibit IX in November 1895.

In January 1896 the first defendant executed to the second defendant alone exhibit B, which is called a yethiridai deed whereby after reciting that the second defendant and his younger brothers had, on the 27th November 1895, conveyed to him the lands in question for Rs. 350, he agreed to resell them to the second defendant if on the 29th January 1901—"without obtaining from others and by your own earnings"—he paid the sum of Rs. 350.

The second defendant on the 29th June 1898 conveyed under exhibit A his rights to the plaintiff and the plaintiff now sues to recover the land by paying off the amount payable under exhibit B to the first defendant.

The District Munsif dismissed the suit: but on appeal the District Judge held that exhibits IX and B together constituted a mortgage and that the plaintiff was entitled to redeem.

We are clearly of opinion that this is wrong. The case is governed by *Situl Pershad v. Luchmi Pershad Singh*(1) with which it is practically on all fours.

The two exhibits IX and B do not, in our opinion, constitute one transaction. They are not between the same parties and they cannot be construed as constituting a mortgage.

(1) L.R., 10 I.A., 129.

Moreover, exhibit B creates a contract personally with the second defendant alone which was not assignable. The plaintiff, therefore, under exhibit A acquires no rights as against the first defendant. The suit should have been dismissed. We reverse the decree of the District Judge and restore that of the District Munsif with costs in this and in the lower Appellate Court.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Moore.

ARUNACHELLAM CHETTY (PETITIONER-FIRST DEFENDANT),
APPELLANT,

v.

RAMANADHAN CHETTY (MINOR) BY HIS NEXT FRIEND
ALAMELU ACHI (COUNTER-PETITIONER, ATTACHING-CREDITOR),
RESPONDENT.*

1905.
December 5.

Civil Procedure Code—Act XIV of 1882, ss. 258, 462—Adjustment of decree by guardian without leave under s. 462 cannot be certified under s. 258 of the Civil Procedure Code.

The provisions of section 462 of the Code of Civil Procedure apply to compromises after decree; and no adjustment by compromise of a decree by the guardian of a minor can be certified under section 258 of the Code of Civil Procedure when the guardian had not applied for leave to enter into the compromise under section 462 of the Code.

THE minor respondent, in execution of a decree, attached certain decrees passed against the appellant and his brother, and took proceedings in execution of the decrees so attached. Thereupon a compromise was entered into by which the guardian of the respondent through her agent agreed to give up a portion of the amount due under the attached decrees and received the balance. The appellant applied to the Court under section 258 of the Code of Civil Procedure to certify the adjustment thus made.

The Subordinate Judge refused to certify on the ground that the guardian had not obtained leave under section 462 of the Code of Civil Procedure to enter into the compromise.

* Civil Miscellaneous Appeal No. 30 of 1905, presented against the order of M.R.By. W. Gopalachariar, Subordinate Judge of Madura (East), in Execution Application No. 328 of 1904 (Original Suit No. 46 of 1901).

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ACHI.

Appellant appealed to the High Court.

T. Rangachariar and *S. Venkatachariar* for appellant.

C. V. Anantakrishna Ayyar for respondent.

JUDGMENT.—The appellant asked for an order under section 258, Civil Procedure Code, certifying that the claim of the attaching-creditor had been adjusted by a compromise. The attaching-creditor is a minor and when the application under section 258 of the Civil Procedure Code was made no application had been made by his guardian for leave to enter into the compromise relied upon as the adjustment as required by section 462 of the Civil Procedure Code. In this state of things we think the Court below was right in declining to make an order under section 258 of the Civil Procedure Code. This appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

LAKSHUMI AMMAL (PETITIONER), APPELLANT,

v.

SEERANGATHAMMAL (RESPONDENT), RESPONDENT.*

1905.
November 23.

Lunacy Act—Act XXXV of 1858, ss. 3, 9, 10—Court bound to enquire into existence of property if denied.

A petition under Act XXXV of 1858 to declare a person a lunatic and to appoint a proper manager and guardian, should not be dismissed without enquiry because the counter-petitioner denies the existence of any property belonging to the lunatic.

The existence of such property is necessary as a pre-requisite to the Court taking action and must be ascertained by enquiry where the existence of such is alleged by the petitioner and denied by the other party.

The petitioner (appellant) was the wife and the counter-petitioner was the mother of one G alleged to be a lunatic. The petitioner alleging that the properties belonging to G were in the control and management of the counter-petitioner who was wasting them, applied to the District Court under sections 3, 9 and 10 of Act

* Civil Miscellaneous Appeal No. 21 of 1905, presented against the order of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Original Petition No. 763 of 1904.

XXXV of 1858 for the appointment of a guardian and manager. The counter-petitioner contended, *inter alia*, that the insanity of G was congenital, and that the properties alleged to have become his by inheritance did not so devolve on him under Hindu Law as he was incompetent to inherit, and that she inherited the properties which accordingly belonged to her.

The District Judge dismissed the application as the counter-petitioner denied that the lunatic had any properties.

Petitioner appealed to the High Court.

Sir *V. Bhashyam Ayyangar* and *S. Gopalaswami Ayyangar* for appellant.

S. Srinivasa Ayyangar for *V. Krishnaswami Ayyar* and *S. Srinivasa Ayyar* for respondent.

JUDGMENT.—We think that the District Judge is in error in refusing to entertain the petition on the ground that it is not admitted that the alleged lunatic is possessed of any property. If that were a sufficient reason the jurisdiction of the Court could be ousted in every case by the respondent simply refusing to admit that the lunatic has any property. No doubt it is necessary as a pre-requisite to the Court taking action that the Court should be satisfied that the alleged lunatic has property.

The petitioner alleges that the lunatic has property, and the respondent denies it. Obviously it is necessary for the District Judge to enquire, it may be summarily, and to decide whether or not the lunatic has property, and in case he decides in the affirmative the District Judge should proceed to take further action in accordance with law.

We set aside the order of the District Judge with costs and remand the petition for disposal according to law.

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v.
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AMMAL.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

1905.
November 1.

GANAPATHY AYYAR AND OTHERS (SECOND AND THIRD
PETITIONERS AND THEIR REPRESENTATIVES), APPELLANTS,

v.

CHENGA REDDI AND OTHERS (RESPONDENTS), RESPONDENTS.*

*Civil Procedure Code—Act XIV of 1882, s. 258—Uncertified adjustment
cannot be taken notice of by Court.*

An adjustment of a decree out of Court which is not certified to the Court cannot, under section 258 of the Code of Civil Procedure, be pleaded as a bar to execution.

Periatambi Udayan v. Vellaya Goundan, (I.L.R., 21 Mad., 409), followed,
Ramayyar v. Ramayyar, (I.L.R., 21 Mad., 356), referred to.

THE plaintiff (since deceased) in Original Suit No. 164 of 1899 on the file of the District Munsif of Poonamallee obtained a decree for possession against the defendants of certain lands with mesne profits and costs. Possession of the lands had been delivered in the lifetime of the plaintiff. After his death, the executors to his estate (the present appellants) applied for execution of the decree for costs in 1902. The defendants objected to the execution of the decree on the ground that it was agreed between them and the deceased plaintiff that the plaintiff should sell the lands to them and take a mortgage bond from such defendants on the lands for their price, mesne profits and costs; that subsequent to the plaintiff's death the petitioners (executors) confirmed the agreement and took hypothecation bonds in June-July 1901. The defendants stated that the petitioners after putting them off from time to time finally took out execution. This, the defendants contended, was fraud which disentitled the petitioners to obtain execution of the decree.

The District Munsif held that on the facts stated there was no complete adjustment and that the alleged fraud was collateral and

* Civil Miscellaneous Appeal No. 174 of 1903, presented against the decree of R. D. Broadfoot, Esq., District Judge of Chingleput, in Appeal Suit No. 75 of 1903, presented against the order of M.R.Ry. V. Swaminatha Ayyar, District Munsif of Poonamallee, in Execution Petition No. 828 of 1902 (Original Suit No. 164 of 1899).

not one which could be pleaded in bar of execution. He distinguished the case on these grounds from the decision in *Ramayyar v. Ramayyar*(1) and without going into the evidence allowed execution to proceed. As more than three months had elapsed between the alleged adjustment and the application for execution, the defendants' right to apply to have the alleged adjustment certified was barred.

In appeal the District Judge held that as there was a binding contract in supersession of the decree, the suppression of such a contract was a fraud upon the Court as well as the party, and would, if proved, disentitle the petitioners to apply for execution. He accordingly reversed and remanded the case for decision on the merits.

Against this order the petitioners appealed.

The Hon. Mr. P. S. Sivaswami Ayyar and A. S. Balasubrahmaniam Ayyar for appellant.

Mr. Joseph Satya Nadar for respondent.

JUDGMENT.—We think that the decision of the District Judge is wrong. The case of *Periatambi Udayan v. Vellaya Goundan*(2) is exactly in point, and is directly opposed to the view taken by the District Judge. We think that the view of section 258, Civil Procedure Code there taken is correct. The only case quoted by the District Judge which is in any way opposed to this view is *Ramayyar v. Ramayyar*(1), in which the Court laid special stress on the fact that a fraud had been practised on the Court. If that case is to be regarded as in conflict with the decision in *Periatambi Udayan v. Vellaya Goundan*(2) as to the application of section 258, Civil Procedure Code to a case like the present, we are unable to follow it.

We set aside the order of the District Judge and restore that of the District Munsif with costs in this and in the lower Appellate Court.

(1) I.L.R., 21 Mad., 356.

(2) I.L.R., 21 Mad., 409.

GANAPATHY
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v.
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REDDI.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

1905.
December 19.

VENKATACHALLAM CHETTY (PETITIONER'S—THIRD
PLAINTIFF'S—REPRESENTATIVE), APPELLANT,

v.

VEERAPPA PILLAI AND OTHERS (DEFENDANTS NOS. 6, 11, ETC.),
RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 260—Decree for perpetual injunction, execution of—Limitation Act XV of 1877, sch. II, art. 178—Application in time if within three years of breach complained of—Court executing decree, powers of—Cannot go behind decree.

Where a perpetual injunction has been granted, on each successive breach of it the decree may be enforced under section 260 of the Code of Civil Procedure by an application made within three years of such breach under article 178, schedule II, of the Limitation Act.

The decree-holder is not bound to take action in respect of every petty infringement; and the injunction does not by his inaction become inoperative after three years from the date of the first petty breach so as to disentitle him to take action where a serious breach is afterwards committed.

Where the terms of a decree are clear, the executing Court is bound to give effect to it and cannot read into it limitations gathered from a reference to the records of the suit.

THE facts are stated as follows in the order of the Court of First Instance.

ORDER.—The third plaintiff—decree-holder in Original Suit No. 1 of 1890 seeks to execute the decree in that suit by way of arrest of the counter-petitioners.

His application was presented on 4th February 1901.

The date of the decree is 20th December 1890.

The suit related to a jungle and land to the south of it in the limits of Kurunthambattu village—which will be called plaintiff's village. It was alleged in the plaint that the jungle in dispute belonged to the plaintiff's village, and that in September 1886

* Civil Miscellaneous Second Appeal No. 43 of 1903, presented against the decree of H. Moberly, Esq., District Judge of Madura, in Appeal Suit No. 188 of 1902, presented against the order of M.E.Ry. T. Varada Rao, Subordinate Judge of Madura (East), in Execution Petition No. 20 of 1901, in Original Suit No. 1 of 1890.

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some of the defendants entered on the jungle on the pretence of some right, cut leaves, felled trees and grazed their cattle and generally trespassed on the forest.

The plaintiff prayed *inter alia* for a decree declaring that the defendants had no sort of right to the jungle and granting a permanent injunction restraining the defendants from interfering with or obstructing plaintiff's absolute enjoyment of the same.

The wrong complained of consisted in the defendants entering on the jungle cutting leaves and trees and grazing cattle in the jungle.

Issue 6 was, whether and which of the defendants committed the waste mentioned in paragraph 6 of the plaint.

The evidence on the point is summarized in paragraph 27 of the judgment and is centered to only one contention, viz., the trespass and the cutting of the leaves by the defendants.

In paragraph 29 of the judgment it is said: "Hence the most appropriate relief they (plaintiff's) could claim is what they have actually asked for, viz., declaration of plaintiff's right and injunction against the defendants. In the result, the plaintiffs were awarded a decree in terms of the plaint save and except the damages claimed which were disallowed."

A writ of injunction (exhibit B) followed this decree on 5th February 1892 and was publicly notified to the defendants in the following terms:—"Whereas it has been decreed that the disputed jungle belongs to plaintiff's village and to the plaintiffs, that the defendants have no sort of right in it and that the defendants should not enter or offer obstruction to plaintiff's enjoyment, the defendants are hereby ordered not to hereafter in any manner enter the aforesaid jungle."

The aid of this Court is now invoked because defendants Nos. 6, 11, 12, 13, 15, 16, 18, 19, 20, 21, 23, 24, 28, 33, 35, 37 and 41 have excavated channels in the disputed jungle contrary, it is alleged, to the injunction issued in the decree in Original Suit No. 1 of 1890.

Two objections are taken on behalf of the counter-petitioners—firstly, that the injunction in Original Suit No. 1 of 1890 was confined to the act of cutting leaves and trees by defendants in the disputed jungle, and that the injunction order does not refer to and restrain the defendants from enjoying their easement rights to surface drainage; and secondly, that even if the injunction is

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taken to include the aforesaid prohibition, the remedy by execution is barred under article 178 of the Indian Limitation Act.

Taking the objection first urged—Reading the plaint and judgment in Original Suit No. 1 of 1890, it appears that the plaintiffs did not put forward the dispute in regard to the flow of water. Neither does it appear that the defendants asserted their easement rights at the time.

For the petitioners it is contended that their contention in the suit was that the defendants had no sort of right to the disputed jungle and that this plea was conceded by the decree and is so extensive as to completely cover the rights of easement now set up. I must observe that an easement is not a right to land, nor to any corporeal interest in the land. It is in its essence a privilege—(see definition of easement in section 4, Act V of 1882). The dispute in Original Suit No. 1 of 1890 related to the proprietary interest in the forest itself. It was unnecessary to raise questions regarding rights to surface drainage on it.

I am therefore of opinion that the acts now complained of by the petitioner cannot be considered as constituting disobedience of the injunction issued in Original Suit No. 1 of 1890.

Secondly, on the question of limitation, I am of opinion that the application is barred. It is clear from exhibits III and V that twelfth defendant, fifteenth defendant, twenty-fourth defendant, thirty-third defendant and thirty-seventh defendant are alleged to have cut open the dams and removed them and diverted the water to their tank on 6th September 1897. The complainant in Calendar Case No. 419 of 1897 (exhibit III) was one Vyravan Ambalam, a big pattadar, and Ambalam of plaintiff's village. Where a decree awards a perpetual injunction, application for execution of the decree (under article 178) must be made within three years from the time when the defendant first acts contrary to such decree.

The Subordinate Judge dismissed the petition and his order was confirmed on appeal.

Petitioner preferred this appeal to the High Court.

The Advocate-General (Hon. Mr. J. P. Wallis) and K. Srinivasa Ayyangar for appellants.

T. Rangaramanuja Chariar for respondents.

JUDGMENT.—The District Judge's order cannot be supported. When a perpetual injunction has been granted, on each successive

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breach the decree may be enforced under section 260, Civil Procedure Code, by the imprisonment of the person against whom the decree has been made, and by the attachment of his property and we think that an application to enforce it must be made under article 178 of schedule II of the Limitation Act within three years of the date of the particular breach of it which is the occasion for the application. But it cannot be that the decree-holder is obliged to take action in regard to every petty infringement of the injunction on pain of allowing the injunction to become altogether inoperative after three years from the date of the first petty breach. It might not be at all worth the while of the decree-holder to enforce his rights by legal proceedings on each petty breach, as for instance in this case, if a few leaves had been removed from the forest, but there is no reason why this forbearance should deprive him altogether of the fruits of the decree if a serious infringement of it were afterwards made. In the present case the decree-holder in his application referred to the channel being newly cut, and the Commissioner regarded the new cuttings as having been made about one and-a-half years prior to the application. The District Judge did not refer to the date of these, but finding that there had been some infringement so far back as 1897 held that the execution of the decree was barred by article 178. This view as we have said cannot be sustained. We must also point out that the Subordinate Judge was wrong in going behind the terms of the decree. Its terms are perfectly clear, and that being so, it was the duty of the Subordinate Judge, as an executing Court, to give effect to the terms of the decree without attempting to read into it limitations gathered from a reference to the records of the suit in which the decree was passed.

We set aside the decrees of the Courts below and remand the application to the Subordinate Judge who should determine whether there was any infringement of the injunction granted in the decree, and, if so, whether it was within three years prior to the application. If it was, he should proceed to deal with the application in accordance with section 260, Civil Procedure Code. Fresh evidence may be taken.

Costs in this and in the lower Appellate Court will abide and follow the result.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

1905.
November 2. KRISHNAN (MINOR) BY HIS NEXT FRIEND PATHMA PARVATHI
AMMAL (COUNTER-PETITIONER), APPELLANT,

v.

VENKATAPATHI CHETTY (PETITIONER), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, ss. 244, 246—Person attaching decree representative of decree-holder under s. 244—Decree directing sale of property for money due is a decree for money within the meaning of s. 246.

One who attaches a decree is a representative of the decree-holder for the purposes of section 244 of the Code of Civil Procedure and an appeal lies from orders in execution proceedings disposing of questions arising between him and the judgment-debtor, relating to the execution of the decree.

Sah Man Mull v. Kanagasabapathi, (I.L.R., 16 Mad., 20), followed.

A decree directing the plaintiff to recover the decreed amount by sale of properties but not directing payment by the defendant is essentially a decree for money. The provisions as to set off, in section 246 of the Code of Civil Procedure, will apply to such decrees.

Vaidhinathasamy Ayyar v. Somasundaram Pillai, (I.L.R., 28 Mad., 476), followed.

THIS appeal arose out of proceedings in execution of the decree in Original Suit No. 5 of 1900 on the file of the District Munsif of Kumbakonam, which directed that plaintiffs Nos. 1, 2 and 4 should recover by sale of lands in possession of the first defendant (appellant) the sum of Rs. 1,852 and costs. The first defendant obtained a decree against the original plaintiffs, in Original Suit No. 467 of 1901 in the same Court.

The respondent having attached the decree in Original Suit No. 5 of 1900 in execution of a decree he held against the plaintiffs, applied in the execution application under appeal for realisation of the whole decree amount in Original Suit No. 5 by sale of the properties directed to be sold by the decree. The first defendant objected, *inter alia*, on the ground that the sale should

* Civil Miscellaneous Second Appeal No. 99 of 1904, presented against the order of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Civil Miscellaneous Appeal No. 478 of 1904, presented against the order of M.R.Ry. P. Narayana Chari, District Munsif of Kumbakonam, in Execution Petition No. 558 of 1903 (Original Suit No. 5 of 1900).

not be for the whole amount but that he should be allowed to set off against the amount decreed in Original Suit No. 5, the amount due to him under the decree in Original Suit No. 467.

The District Munsif held, on the authority of *Mallikarjuna Sastri v. Narasimha Rao*(1), that, as the decree in Original Suit No. 5 did not direct payment of money but only ordered the sale of properties for money claimed, it was not a decree for money for the purpose of set off under section 246 of the Code of Civil Procedure. The first defendant appealed. Objection was taken by the respondent that the order of the Munsif was not appealable. The District Judge held that the attaching creditor did not obtain the position of the decree-holder for the purposes of section 244 of the Code of Civil Procedure, that therefore no appeal lay, and that the decree in Original Suit No. 5 was not a decree for money. He dismissed the appeal.

The first defendant appealed to the High Court. The respondent took the preliminary objection that no appeal lay.

C. R. Thiruvengkatachariar for appellant.

K. Ramachandra Ayyar for respondent.

JUDGMENT.—As regards the preliminary objection, we think that it must be overruled under the authority of the case of *Sah Man Mull v. Kanagasabapathi*(2) followed in *Pranal Annes v. Sreennevasa Mudali*(3).

On the merits, we think that the decree (in Original Suit No. 5 of 1900) which is attached is essentially a decree for money. The case of *Mallikarjuna Sastri v. Narasimha Rao*(1) relied on by the District Munsif has been recently overruled by the Full Bench in *Vaidhinathasamy Ayyar v. Somasundaram Pillai*(4). It is therefore open to the appellant to set off against the decree in Original Suit No. 5 of 1900 any decree for money which he holds against the decree-holder therein.

We must therefore set aside the order of the Courts below and remand the petition to the District Munsif for disposal according to law. Costs in this and in the lower Appellate Court will abide and follow the result.

(1) I.L.R., 24 Mad., 412.

(3) C.M.A. Nos. 152 to 156 of 1901 (unreported).

(2) I.L.R., 16 Mad., 20.

(4) I.L.R., 28 Mad., 478.

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APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice Sankaran Nair.

ADAKKALAM CHETTIAR (FIRST DEFENDANT—
FIRST RESPONDENT), APPELLANT,

v.

RAMALINGA CHETTIAR AND OTHERS (PLAINTIFFS,
APPELLANTS NOS. 1 TO 5 AND RESPONDENTS NOS. 2 TO 12 AND 15),
RESPONDENTS.*

Res judicata—Decision in previous suit that an agreement barred plaintiffs' right
—Such decision *res judicata* though agreement time barred at date of subsequent
suit.

A decision in a previous suit for possession of property that an agreement to sell executed by the owner of such property in favour of the defendant and a tender of performance by the defendant, disentitled the plaintiff (who was found to have purchased with knowledge of the agreement and tender) to possession, will operate as *res judicata* in a subsequent suit between the same parties on the same cause of action. The fact that at the time the subsequent suit was instituted such contract of sale had become unenforceable by the Law of Limitation will not prevent the operation of the bar when it is clear from the judgment in the previous suit that the Court did not intend that the defendant should bring a suit for specific performance of the contract.

SUIT for redemption. The plaint lands belonged to one N at whose death, his widow, the fifteenth defendant, became the owner. These lands were mortgaged to the first defendant by N in his lifetime, and after his death the fifteenth defendant mortgaged them with possession in 1881 to the first defendant, to whom she also executed, on the 28th May 1885, an agreement to sell the properties. The first defendant tendered the amount due under the agreement to the fifteenth defendant and demanded completion of the sale; but the fifteenth defendant refused and sold the properties to A, the grandfather of the plaintiffs, on the 15th June 1885. Thereupon, A filed a suit (Original Suit No. 38 of 1885) against the first defendant and others for redemption of the mortgages in favour of the first defendant.

* Civil Miscellaneous Appeal No. 122 of 1903, presented against the order of remand of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 53 of 1902, presented against the decree of M.R. Ry. N. Sarvothama Rao, Subordinate Judge of Tanjore, in Original Suit No. 36 of 1900.

The first defendant pleaded the agreement to sell executed by the fifteenth defendant in his favour and it was decided ultimately by the High Court in *Adakkalam v. Theethan*(1) that the plaintiff was not entitled to possession as he bought with knowledge of the agreement with and tender by the first defendant. The present suit was instituted by the grandsons of A to redeem the same properties. The plaintiffs alleged *inter alia* that as the agreement of sale executed in favour of the first defendant had become barred by limitation, their right of redemption had become enforceable.

The Subordinate Judge held that the suit was barred by *res judicata* and dismissed the plaintiffs' claim.

The District Judge on appeal held that there was no *res judicata* and remanded the case for retrial.

The first defendant appealed.

C. R. Tiruvenkatachariar for appellant.

T. R. Venkatarama Sastri for the Hon. Mr. P. S. Sivaswami Ayyar and V. Purushothamier for respondents.

JUDGMENT.—The judgment of the District Judge cannot in our opinion be upheld. In the decision in *Adakkalam v. Theethan*(1), it was decided that if the first defendant in that suit, who is also the first defendant in the present suit, could prove the agreement to convey and the tender of the purchase money he should not be compelled to bring another suit to obtain specific performance of his contract of sale. It was added that if the plaintiff there, who, as the District Judge observes, may be identified with the plaintiffs in the present suit, brought with the knowledge of the agreement and the tender he ought not to be allowed to obtain possession. Issues were accordingly sent down and the two questions above set out were answered in the affirmative by the District Judge and his findings were accepted by the High Court and the suit of the plaintiff was dismissed. The plaintiff has now brought the present suit in which it is admitted that the cause of action is identical with that dealt with in *Adakkalam v. Theethan*(1). The parties are also virtually the same. The Subordinate Judge accordingly found that the present suit was *res judicata* by reason of the decision in the prior suit and on that ground dismissed the plaintiffs' suit. The District Judge has reversed his decision and held that there is no bar in

(1) I.L.R., 12 Mad., 505.

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consequence of the plea of *res judicata*. The grounds of his decision are that when the judgment of the High Court in *Adakkalam v. Theethan*(1) was passed the contract for sale was one on which the first defendant could sue, but that as that contract is now ineffective; and cannot be pleaded, the facts on which a decision should now be based are materially changed and that the previous decision accordingly no longer concludes the parties. This, however, is a mistake. It will be found that when the final decision of the High Court was passed on the 2nd April 1889 the right to sue for specific performance of the contract for sale was already barred by limitation. It is clear from the judgment of the High Court that it was not intended by the learned Judges that the first defendant should bring a suit to enforce specific performance of his contract. We accordingly hold the present suit is barred as *res judicata* and set aside the decree of the District Judge and restore that of the Subordinate Judge with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice Sankaran Nair.

1906.
January 31.

KOROTH AMMAN KUTTI (PETITIONER-DECREE-HOLDER),
APPELLANT,

v.

PERUNGOTTIL APPU NAMBIAR AND ANOTHER (LEGAL REPRESENTATIVE OF FIRST COUNTER-PETITIONER, FIRST DEFENDANT), RESPONDENTS.*

Malabar Law—Effect of gift of property to a female and her children—Such property not assets for the debts of a deceased member.

A gift of property to a female and some or all of her children by their father or the Karnavan of the Tarward has not the effect of constituting them into a Tarward by themselves.

† (1) I.L.R., 12 Mad., 505.

* Civil Miscellaneous Second Appeal No. 69 of 1905, presented against the order of A. Venkataramana Pai, Esq., District Judge of North Malabar, in Appeal Suit No. 89 of 1905, presented against the order of J. F. D'Souza, Esq., District Munsif of Nadapuram, in Execution Petition No. 588 of 1904 (Original Suit No. 120 of 1900) of Panur Munsif's Court.

They, however, hold the properties so given with the ordinary incidents of Tarward property and when a member dies, his interest passes by survivorship to the others and is not available for attachment at the instance of a decree-holder.

Kunhacha Umma v. Kutti Mammī Hajee, (I.L.R., 16 Mad., 201), referred to.

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CERTAIN properties were given under a deed of gift to one Unichira and her children by the Karnavan of the Tarward. One of her children Koram Nambiar was indebted to the petitioner (appellant), who, after the death of Koram Nambiar, brought a suit and obtained a decree against the personal assets of the deceased. In execution of the decree the petitioner sought to attach the interest of Koram Nambiar in the properties given to Unichira.

The District Munsif disallowed his application for attachment on the ground that Unichira and her children took the property with the incidents of Tarward property.

On appeal the District Judge confirmed the decision of the lower Court, remarking, however, in his judgment that Unichira and her children formed a Tarward in themselves.

The petitioner appealed to the High Court.
J. L. Rosario for appellant.

V. Ryrū Nambiar and C. V. Anantakrishna Ayyar for respondent.

JUDGMENT.—In this case one Unichira and her three sons obtained certain lands on gift. After the death of one of the sons, Koram Nambiar, a decree was obtained against one of the surviving sons to pay the debt out of the assets of the deceased. The decree-holder now seeks to execute his decree by attachment of the share of Koram Nambiar in the properties above referred to.

The District Judge has held that Unichira and her sons formed a separate Tarward by reason of their having obtained these properties on gift and therefore Koram Nambiar had no interest available for attachment and sale.

We are unable to agree with the District Judge in his view that when a female and some of or all her children obtain any property from their father or Karnavan as in this case, they are thereby constituted into a Tarward by themselves, the senior member among them having the ordinary rights of the Karnavan of a Malabar Tarward so far as the other members in his branch are concerned.

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NAMBIAR.

The case (*Kunhacha Umma v. Kutti Mammi Hayee*(1)) referred to by the Judge is not an authority for that proposition. It only decides that these persons hold such properties with the ordinary incidents of Tarward property. In that case as here, the decree was obtained against the assets of the deceased member. And that is an authority accordingly for the proposition that when a member dies, his interest in the property survives to the others and is no longer available for attachment at the instance of a decree-holder. To that extent we are bound by that decision and we must accordingly hold that the orders of the lower Courts are right and dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Sankaran Nair.

ABRAHAM PILLAI (SECOND DEFENDANT), PETITIONER,

v.

DONALD SMITH AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, ss. 73, 75, 82, 622—Substituted service can only be made when defendant keeps out of the way or where the summons cannot be served in the ordinary way.

Whenever it is practicable, the service of summons must be in person under sections 73 and 75 of the Code of Civil Procedure; and it is only when reasonable grounds exist for believing that the defendant is keeping out of the way to avoid service, or that for other reasons it cannot be served in the ordinary way that substituted service should be ordered.

Subramania Pillai v. Subramania Ayyar, (I.L.R., 21 Mad., 19) followed.

Sankaralinga Mudali v. Ratnasabhapati Mudali, (I.L.R., 11 Mad., 325), distinguished.

PETITION under section 622 of the Code of Civil Procedure against the order of the Court of Small Causes at Madras refusing to set

(1) I.L.R., 16 Mad., 201.

* Civil Revision Petition No. 148 of 1905, presented under section 622 of the Code of Civil Procedure and section 15 of the Charter Act, praying the High Court to revise the order of the Court of Small Causes, Madras, in Suit No. 13426 of 1904.

aside an *ex parte* decree passed against the defendant in Small Cause No. 13426 of 1904.

The facts necessary for this report are set out in the judgment.

K. N. Aiyar for petitioner.

Messrs. *Orr, David & Brighwell* for respondent.

JUDGMENT.—The petitioner applied to set aside an *ex parte* decree obtained against him on the ground that he was not duly served with the summons. It appears from the reports of the Village Munsif and the process-server that they went to the house of the defendant at Anumanthampatti and were told by his wife that he had gone to Peermade coffee garden and that she did not know when he would return. There was no male member to receive the summons. The process-server thereupon affixed a copy of the summons on the outer wall of the house of the defendant.

There was no further attempt made to serve the summons on the defendant personally. The suit was heard *ex parte* and a decree passed against him, which is now sought to be set aside.

I am of opinion that the decree must be set aside.

Whenever it may be practicable, the service of summons shall be made by delivering or tendering a copy to the defendant in person (sections 73 and 75 of the Code of Civil Procedure), and it is only when reasonable grounds exist for believing that the defendant is keeping out of the way to avoid service or that for other reasons it cannot be served in the ordinary way that substituted service should be ordered (section 82 of the Code of Civil Procedure). Temporary absence by itself will not justify a resort to this mode (*Subramania Pillai v. Subramania Ayyar*(1)), and if there were reasons for believing that the defendant's absence was not temporary, then an attempt should have been made to effect service on the defendant in person in Travancore under section 89 or 90 of the Code of Civil Procedure. In this case service under section 89 could have been made as the defendant received at Peermade a registered letter addressed to him by the plaintiffs, after the decree was passed. See *Sakina v. Gauri Sahai*(2).

(1) I.L.R., 21 Mad., 419.

(2) I.L.R., 24 All., 803.

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In *Sankaralinga Mudali v. Ratnasabhupati Mudali*(1), it was not known where the defendant was; nor whether his absence was only temporary and it was accordingly held that there was no prospect of serving him personally within a reasonable time. That case does not therefore apply.

The Judge has therefore acted with material irregularity in holding the affixing of the summons to be proper service (*Jagannath Brakhhbau v. J. E. Sassoon*(2)), and his order is therefore reversed, the *ex parte* decree set aside and he is directed to restore the suit to his file and proceed with it in accordance with law.

The costs in this Court will be provided for in the final decree.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar.

1905.
December 4,
15.

THE MUNICIPAL COUNCIL OF CUDDALORE (DEFENDANT),
PETITIONER,

v.

SUBRAHMANIA AYYAR (PLAINTIFF), RESPONDENT.*

*District Municipalities Act (Madras) Act IV of 1884, s. 55—'Day,' what is—
Circumstances which determine whether particular days are to be reckoned or omitted.*

The word 'day' in section 55 of the Madras District Municipalities Act means a duration of 24 hours and the period of 60 days for which the person must have 'held office within the limits' must be held to be 60 entire and unbroken periods, in law, of 24 hours each. It will depend upon the circumstances whether fractions of a day are to be omitted or to be counted as whole days and the cause and character and duration of absence from Municipal limits will determine whether particular days are to be reckoned or omitted.

SUIT by the plaintiff for recovery of profession tax alleged to have been illegally collected by the Municipal Council of Chidambaram.

(1) I.L.R., 21 Mad., 325.

(2) I.L.R., 18 Bom., 606.

* Civil Revision Petition No. 201 of 1905, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of M. R. Ry. S. Swaminatha Sastri, District Munsif of Cuddalore, in Small Cause Suit No. 1065 of 1904.

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AYYAR.

The District Munsif passed a decree in favour of the plaintiff. The material portion of his judgment is as follows:—

"The plaintiff is the Divisional officer of the Chidambaram Division, South Arcot district, with his head-quarters, within the municipal limits of Cuddalore. His case is that he has resided and carried on business within the municipal limits for 59 days only during the half year for which tax has been levied from him. The plaintiff at the same time adds that the 59 days are irrespective of those days on which he left this town on circuit before 5 A.M. or he came back to this town after 7 P.M. He goes into the witness box and asserts that during such days he did no business connected with his duty as Divisional officer. He further adds that he never does any office work in lamp light. There is no evidence *contra* that he did any office work before 5 A.M. or after 7 P.M. The question for consideration is whether such days could count for the days to make up the period requisite for assessment purposes. The ruling in *Chairman, Ongole Municipality v. Munnsey*(1) is directly in favour of plaintiff's contention. Sir Muttusami Ayyar says that the material words 'hold office or appointment within the municipality' mean carrying on business there as the holder of the particular office. Towards the close of his judgment the same Judge further adds that it is an essential condition of liability that the profession should be exercised within the municipal limits.

The said ruling was quoted as conclusive authority in the more recent case in *Hammick v. President, Madras Municipal Commission*(2). No doubt, this latter case arose under the City of Madras Municipal Act, section 193. I come to the conclusion that the assessment was illegal and that the plaintiff is entitled to a refund of the same.

My decree is that plaintiff do recover from the defendant Rs. 6 with costs of suit."

Defendant presented this petition to the High Court under section 25 of Act IX of 1887.

The Hon. Mr. P. S. Sivaswami Ayyar for petitioner.
T. Subrahmania Ayyar for respondent.

(1) I.L.R., 17 Mad., 453.

(2) I.L.R., 22 Mad., 145.

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MANIA
Ayyar.

JUDGMENT.—The question in this case is whether Mr. Subrahmaniam Ayyar, the Deputy Collector in charge of the Chidambaram Division, South Arcot district, was liable to be assessed for professional tax for the half year ending the 30th September 1903 by the Municipality of Cuddalore which is his head-quarter station. That during such time as Mr. Subrahmaniam Ayyar stayed in Cuddalore during the half year, he was holding the office of Deputy Collector, is indisputable. The only question is whether he so held office for the prescribed length of time. If he held the office within limits of the said municipality for 60 (sixty) days reckoned consecutively or from time to time within the half year he was under section 55 of the District Municipalities Act liable to pay the tax. Now the term 'day' is no doubt in one sense understood to cover the time from sunrise to sunset. The more general meaning of the word is, however, from sunrise to sunrise (a natural day) or from midnight to midnight (a calendar day); and the word "days" in the section referred to above must, in the absence of anything to the contrary in the context, be taken to mean a duration of 24 hours and not 12 hours. If this is correct, to charge the tax, the municipality had to show that Mr. Subrahmaniam Ayyar spent within its limits not merely fractions of days sufficient when added up to constitute 1,440 hours but 60 entire and unbroken periods, in point of law, of 24 hours each. In saying this I do not of course wish to be understood as suggesting that mere absence from the municipal limits on the part of Mr. Subrahmaniam Aiyar for any part of a particular day or even for a whole day will necessarily prevent that day being counted as one of the sixty. No hard and fast rule can be laid down on such a question. It has to be remembered that fractions of a day are either omitted from calculation or are counted as whole days according to circumstances (Lindley's 'Jurisprudence,' appendix page lxiv citing *Clayton v. Presenham*(1) and *Reg v. St. Mary Warwick*(2)). The cause and character and the duration of the absence from the municipal limits of the office-holder on the particular occasion are matters to be borne in mind in determining whether particular days are to be reckoned or omitted in cases like the present. The decision must be given with reference to these considerations, a view on the whole

(1) Part 5, Coke 1 (a).

(2) 1 E. & B., 816.

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reasonable being what has to be adopted. By way of explanation two obvious illustrations may be given. Suppose the officer was away for an hour or two or even for a whole day for recreation or other personal purposes that will clearly not reckon against the municipality and he would still be taken in point of law to have "held office within the limits" for the day. On the other hand if he had been obliged to stay outside the municipal limits in the discharge of his official duties from, as it has been proved in this case, morning till evening, his spending the night within the limits would not warrant its being held that he held office that day within the limits. Though it may be easy to suggest a case almost on the border line it is scarcely necessary to say that no practical difficulty can occur in the application of the above view to cases arising under the enactment in question.

Upon the facts found by the District Munsif his decision is right. The petition is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

SUBBAROYADU (PLAINTIFF), PETITIONER,

v.

GANGAYYA (DEFENDANT), COUNTER-PETITIONER.*

Provincial Small Cause Court Act IX of 1887, s. 23—Exercise of power under section 23 gives Court jurisdiction to try suit as an original suit.

Where a question of title which a Court of Small Causes cannot finally determine is involved in a small cause suit, the Court has discretionary power under section 23 of Act IX of 1887 to return the plaint to be presented to a Court having such jurisdiction. The latter Court thereupon acquires jurisdiction to try the suit as an original suit and is bound to receive the plaint and try it as such.

Mahamaya Dasya v. Nitya Hari Das Bairagi, (I.L.R., 23 Cal., 425), followed.

* Referred Case No. 17 of 1905, stated under section 648-B of Act XIV of 1882 by O.G. Spencer, Esq., Acting District Judge of Godavari, in the matter of the plaint filed as Original Suit No. 116 of 1905 on the file of the District Munsif of Ellore.

1906.
January 4.

SUBBA-
ROYADU
v.
GANGAYYA.

THE facts of this case are set out in the letter of reference as follows:—

“The suit was first filed in the Ellore District Munsif's Court. It was for refund of certain purchase money from defendant who failed to deliver peaceful possession of the premises purchased. The defendant filed a statement pleading that plaintiff had no right to recover the purchase money unless he established want of title on the part of the defendant. The District Munsif holding that such suit was not excepted from the jurisdiction of a Small Cause Court, returned the plaint for presentation in the proper Court.

The Additional Sub-Judge of Rajahmundry in whose Court the plaint was then presented on the small cause side, returned the plaint under section 23 of the Provincial Small Cause Courts' Act, as not being cognisable by a Small Cause Court as a question of title had to be incidentally determined.

The plaint was again presented on the original side in the District Munsif's Court of Ellore. But the present District Munsif returned the plaint on the ground that he had no power to go behind his predecessor's order which was still in force not being overruled by an Appellate Court.

The plaintiff then moved this Court by O.P. 439/1905 to make a reference to the High Court. The suit is in my opinion excluded under clause II of second schedule of Provincial Small Cause Courts' Act as questions of title have to be incidentally determined. The District Munsif should have taken it on the original side. His predecessor apparently ignored the question of title to be determined incidentally.”

ORDER.—The object of section 23 of the Provincial Small Cause Courts' Act is to enable the Small Cause Court to decline to exercise its jurisdiction in a small cause suit, when the right of the plaintiff and the relief claimed by him depend upon the proof or disproof of a title to immoveable property or other title which the Small Cause Court cannot finally determine, and to return the plaint to be presented to a Court having jurisdiction to determine the title. The exercise of the power is discretionary with the Small Cause Court, and when it is exercised the effect is to give the Court's jurisdiction to try the small cause suit as an original suit notwithstanding anything in section 16 of the Act

(*Muhamaya Dasya v. Nitya Hari Das Bairagi*(1)). The District Munsif must therefore receive the plaint and deal with it according to law.

SUBBA-
ROYADU
v.
GANGAYYA.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Moore.

RUNGA AYYAR

v.

EMPEROR.*

1905.
November 10.

Criminal Procedure Code—Act V of 1898, s. 476—Power to direct proceedings conferred on Court and not on Magistrate trying—Dismissal of complaint without adjudication no bar to proceedings under.

The power to direct a prosecution under section 476 of the Code of Criminal Procedure is conferred on the Court and not on the individual Magistrate who tried the case. Such power is not ousted by the dismissal, without adjudication, of a complaint by the party in respect of the same offence under a sanction previously given by the Court.

THE petitioner was a witness for the prosecution in Criminal Case No. 81 of 1903 on the file of the First-class Magistrate of the Calicut Division. The case was tried by the Deputy Magistrate then in charge, who discharged the accused and granted sanction for the prosecution of the petitioner and others for perjury. The accused who obtained the order granting sanction presented an unstamped complaint which was dismissed.

The Head Assistant Magistrate, who succeeded in charge of the Division, directed the prosecution of the petitioner and others under section 476 of the Code of Criminal Procedure.

(1) I.L.R., 23 Cal., 425.

* Criminal Revision Case No. 372 of 1905, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the proceedings of F. Noyce, Esq., Assistant First-class Magistrate in charge of the Calicut Division, in the matter of Miscellaneous Case No. 4 of 1904 according to sanction for the prosecution of the petitioner in Criminal Case No. 81 of 1903 on the file of his Court.

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 AYYAR
 v.
 EMPEROR.

Against the order of the Head Assistant Magistrate, the petitioner presented this revision petition.

V. Krishnaswami Ayyar and M. R. Sankara Ayyar for the petitioner.

The Public Prosecutor Mr. *E. B. Powell* opposed the petition.

ORDER.—We are clearly of opinion that the Court of the Assistant First-class Magistrate in charge of Calicut Division had jurisdiction under section 476 of the Criminal Procedure Code to direct the prosecution, though the Magistrate who made the order under section 476 was not the same Magistrate who tried the case. The power is given to the Court, not to the individual Magistrate. Nor does the fact that the complaint was rejected as not properly stamped in any way bar the jurisdiction of the Court. There was no adjudication on the matter. It was not even necessary for the Court to have read the complaint before rejecting it as not properly stamped.

As the Court of the Assistant First-class Magistrate in charge of Calicut Division had jurisdiction, we have no power to interfere with his order. We may say that we entirely agree with his opinion that it is to be regretted that the Court did not originally deal with the matter under section 476 of the Criminal Procedure Code instead of merely giving sanction to prosecute. We dismiss the petition.

SC

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar and Mr. Justice Davies.

PANCHANADA VELAN (PLAINTIFF), APPELLANT,

v.

VAITHINATHA SASTRIAL AND OTHERS (DEFENDANTS NOS. 1 TO 6, AND 8 TO 16, AND LEGAL REPRESENTATIVES OF THE DECEASED SEVENTH DEFENDANT), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, s. 13—Res judicata—Decrees in cross-suits on same facts—Appeal against one decree only—Decree unappealed no bar to the decision of the appeal.

Where cross-suits between the same parties on the same facts were tried together and judgment was given on the same day but separate decrees were passed and an appeal was preferred against one of the decrees alone :

Held, that the decree unappealed did not operate as a bar under section 13 of the Code of Civil Procedure so as to preclude the Appellate Court from dealing with the decree appealed against.

The doctrine of *res judicata* has no application when the very object of the appeal, in substance if not in form, is to get rid of the decision which is pleaded in bar.

Abdul Majid v. Jew Narain Mahto, (I.L.R., 16 Calo., 233), followed.

SUIT by a tenant under the Madras Rent Recovery Act to compel the tender of a putta by the landlord. A cross-suit was filed in the same Court by the landlord to compel the tenant to accept the putta and execute a muchilika for the same fasli.

The further facts necessary for this report are stated by (Subrahmania Ayyar and Boddam, JJ.), in the order of reference to the Full Bench.

ORDER OF REFERENCE TO A FULL BENCH.—In this case the appellant brought Summary Suit No. 35 of 1901 against the respondents to compel them to grant a putta for fasli 1310. Subsequently, the respondents instituted, before the same Revenue Court, Summary Suit No. 317 of 1901 against the appellant for compelling the acceptance by the appellant of a putta for the same year. The questions at issue in both cases were identical, viz., as to

* Second Appeal No. 997 of 1903, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 160 of 1902, presented against the decision of M.R.Ey. A. Ramacha Nedungadi, Deputy Collector of Pattukotai Division, in Summary Suit No. 35 of 1901.

1905,
 February 24,
 November
 9, 10.

PANCHANADA VELAN v. VAITHINATHA SASTRIAL.

the terms of the putta for the year. The suits were tried together and judgment given on the same day (the 24th December 1901). The decree to be passed in each suit was in effect the same. That, however, was not the course followed by the Court, for Summary Suit No. 35 of 1901 was dismissed, while Summary Suit No. 317 of 1901 was decreed, the terms of the putta being in accordance with judgment in the two cases. The appellant preferred an appeal against the decision of the Revenue Court describing the appeal as one made against the decree in Summary Suit No. 35 of 1901. In the appeal memorandum he made no reference to the decree in Summary Suit No. 317 of 1901, nor did he prefer a separate appeal in the circumstances against the latter. After calling for certain findings to which it is unnecessary to refer, the District Judge has dismissed the appeal of the appellant in Summary Suit No. 35 of 1901 on the ground that the decision of the Revenue Court in Summary Suit No. 317 of 1901 not having been appealed against, he, the District Judge, was precluded from determining the questions raised in Summary Suit No. 35 of 1901, to which the appeal before him related. His view, it is said, receives support from the conclusion in *Gururajammah v. Venkatakrishnama Chetti*(1), viz., that the test with regard to questions of *res judicata* is whether the decision relied on as *res judicata* is in point of date prior to the trial or finding which is sought to be avoided, without reference to the question which of the two suits was first instituted. *Abdul Majid v. Jew Narain Mahto*(2) is on all fours with the present case and according to that decision the view adopted by the District Judge is wrong. Though we may distinguish the present case from the decision in *Gururajammah v. Venkatakrishnama Chetti*(1) on the ground that here the judgment of the Revenue Court was on the same date while it was otherwise in *Gururajammah v. Venkatakrishnama Chetti*(1), we think it more satisfactory to submit the point for the decision of a Full Bench, and we accordingly state the following question for their opinion, viz.

Whether the District Judge was precluded from deciding upon the merits the questions raised before him in the appeal in Suit No. 35 of 1901 by the judgment of the Revenue Court in Suit No. 317 of 1901, no appeal having been preferred against the decision in the latter suit.

(1) I.L.R., 24 Mad., 350 at p. 355.

(2) I.L.R., 16 Cal., 233.

The case came on for hearing in due course before the Full Bench constituted as above.

K. S. Ramaswami Sastri for S. Gopalasami Ayyangar for appellant.

T. Subrahmania Ayyar for the Hon. Mr. P. S. Sivaswami Ayyar for Nos. 1 to 15 respondents.

The Court expressed the following

OPINION.—Technically, no doubt, the tenant's appeal ought to have been in both suits and the proper course for the District Judge to have taken would have been to require the appellant to amend his memorandum of appeal so as to make it an appeal in both suits; but the fact that the tenant only appealed in his own suit and did not prefer an appeal in the landlord's suit did not preclude the District Judge from deciding upon the merits the questions raised in the appeal which was before him. The subject-matter of the litigation in the two suits was the same, the evidence was the same, and the two suits were tried together. The reasons for which the tenant's suit was dismissed were the reasons for which judgment was given in favour of the landlord in his (the landlord's) suit.

We do not think that, either under section 13 of the Civil Procedure Code, or on general principles, the doctrine of *res judicata* has any application to the facts of this case. The doctrine does not apply when, as here, the very object of the appeal, in substance if not in form, is to get rid of the adjudication which is said to render the question which the Appellate Court is asked to decide *res judicata*. The tenant's appeal in his suit if successful would have the effect of superseding the adjudication in the landlord's suit. See the judgment of the Full Bench in *Jogesh Chunder Dutt v. Kali Churn Dutt*(1). It is not necessary to consider what might be the exact legal effect of such a supersession. All we have to decide in the present case is whether the Appellate Court was precluded from dealing with the appeal by reason of the doctrine of *res judicata*.

It would lead to startling results if we were to hold that an Appellate Tribunal is precluded from dealing with a question which comes before it on appeal because an inferior Court, upon the same facts, but in a case other than the case under appeal, had given a

(1) I.L.R., 3 Cal., 30.

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the terms of the putta for the year. The suits were tried together and judgment given on the same day (the 24th December 1901). The decree to be passed in each suit was in effect the same. That, however, was not the course followed by the Court, for Summary Suit No. 35 of 1901 was dismissed, while Summary Suit No. 317 of 1901 was decreed, the terms of the putta being in accordance with judgment in the two cases. The appellant preferred an appeal against the decision of the Revenue Court describing the appeal as one made against the decree in Summary Suit No. 35 of 1901. In the appeal memorandum he made no reference to the decree in Summary Suit No. 317 of 1901, nor did he prefer a separate appeal in the circumstances against the latter. After calling for certain findings to which it is unnecessary to refer, the District Judge has dismissed the appeal of the appellant in Summary Suit No. 35 of 1901 on the ground that the decision of the Revenue Court in Summary Suit No. 317 of 1901 not having been appealed against, he, the District Judge, was precluded from determining the questions raised in Summary Suit No. 35 of 1901, to which the appeal before him related. His view, it is said, receives support from the conclusion in *Gururajammah v. Venkatakrishnama Chetti*(1), viz., that the test with regard to questions of *res judicata* is whether the decision relied on as *res judicata* is in point of date prior to the trial or finding which is sought to be avoided, without reference to the question which of the two suits was first instituted. *Abdul Majid v. Jew Narain Mahto*(2) is on all fours with the present case and according to that decision the view adopted by the District Judge is wrong. Though we may distinguish the present case from the decision in *Gururajammah v. Venkatakrishnama Chetti*(1) on the ground that here the judgment of the Revenue Court was on the same date while it was otherwise in *Gururajammah v. Venkatakrishnama Chetti*(1), we think it more satisfactory to submit the point for the decision of a Full Bench, and we accordingly state the following question for their opinion, viz.

Whether the District Judge was precluded from deciding upon the merits the questions raised before him in the appeal in Suit No. 35 of 1901 by the judgment of the Revenue Court in Suit No. 317 of 1901, no appeal having been preferred against the decision in the latter suit.

(1) I.L.R., 24 Mad., 350 at p. 355.

(2) I.L.R., 16 Cal., 233.

The case came on for hearing in due course before the Full Bench constituted as above.

K. S. Ramaswami Sastri for *S. Gopalasami Ayyangar* for appellant.

T. Subrahmania Ayyar for the Hon. Mr. *P. S. Sivaswami Ayyar* for Nos. 1 to 15 respondents.

The Court expressed the following

OPINION.—Technically, no doubt, the tenant's appeal ought to have been in both suits and the proper course for the District Judge to have taken would have been to require the appellant to amend his memorandum of appeal so as to make it an appeal in both suits; but the fact that the tenant only appealed in his own suit and did not prefer an appeal in the landlord's suit did not preclude the District Judge from deciding upon the merits the questions raised in the appeal which was before him. The subject-matter of the litigation in the two suits was the same, the evidence was the same, and the two suits were tried together. The reasons for which the tenant's suit was dismissed were the reasons for which judgment was given in favour of the landlord in his (the landlord's) suit.

We do not think that, either under section 13 of the Civil Procedure Code, or on general principles, the doctrine of *res judicata* has any application to the facts of this case. The doctrine does not apply when, as here, the very object of the appeal, in substance if not in form, is to get rid of the adjudication which is said to render the question which the Appellate Court is asked to decide *res judicata*. The tenant's appeal in his suit if successful would have the effect of superseding the adjudication in the landlord's suit. See the judgment of the Full Bench in *Jogesh Chunder Dutt v. Kali Churn Dutt*(1). It is not necessary to consider what might be the exact legal effect of such a supersession. All we have to decide in the present case is whether the Appellate Court was precluded from dealing with the appeal by reason of the doctrine of *res judicata*.

It would lead to startling results if we were to hold that an Appellate Tribunal is precluded from dealing with a question which comes before it on appeal because an inferior Court, upon the same facts, but in a case other than the case under appeal, had given a

(1) I.L.R., 8 Cal., 30.

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We think *Abdul Majid v. Jew Narain Mahto*(1) was rightly decided.

Our answer to the question referred to us must be in the negative.

The appeal came on for final hearing before (Subrahmania Ayyar and Boddam, JJ.), when the Court delivered the following JUDGMENT.—According to the decision of the Full Bench, we set aside the decree of the District Judge and remand the appeal to the lower Court for disposal according to law. Costs will abide and follow the event.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

1904.
August 5.
1906.
February 6, 7.
March 9.

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APPELLANTS,

v.

KURRI BAPIREDDI AND ANOTHER (PLAINTIFF AND HIS LEGAL REPRESENTATIVE), RESPONDENTS.*

Transfer of Property Act IV of 1882, s. 54—Enforceable contract of sale followed by delivery of possession to defendant, but not followed by registered sale-deed no defence to suit for possession—Construction of statute.

The provisions of section 54 of the Transfer of Property Act are imperative, and Courts will not be justified in disregarding them on equitable grounds.

Where the words of a statute are clear and unambiguous, effect must be given to them, although hardship may result in individual cases.

A contract of sale followed by delivery of possession does not, when there is no registered sale, create any interest in the property agreed to be sold and

(1) I.L.R., 16 Cal., 233.

* Second Appeal No. 1033 of 1902, presented against the decree of M.R.By. I. L. Narayana Rao, Subordinate Judge of Kistna at Masulipatam, in Appeal Suit No. 791 of 1901, presented against the decree of M.R.Ry. V. Subrahmaniam Pantulu, District Munsif of Guntur, in Original Suit No. 640 of 1899.

cannot, even if enforceable at date of suit or decree, be pleaded in defence to an action for ejectment by one having a legal title to recover.

Ramasami Pattar v. Chinnan Asari, (I.L.R., 24 Mad., 449), approved.

Immudipattam Thirugnana Kondama Naik v. Periya Dorasami, (I.L.R., 24 Mad., 377), considered.

THE lands in dispute belonged to the plaintiff. Sometime before the suit the plaintiff agreed to sell the lands to the tenth defendant, but according to the plaintiff no possession was given to the tenth defendant and the negotiations fell through. The tenth defendant, alleging that he had been put in possession, sold the lands by registered deed to defendants Nos. 1, 2 and 3, who obtained a decree for delivery of possession against the plaintiff in Suit No. 943 of 1898.

The plaintiff thereupon instituted this suit to set aside the decree and to obtain redelivery if possession should be given to defendants Nos. 1 to 3 under the decree in Suit No. 943 of 1898.

The Court of First Instance found that the tenth defendant had paid the price and had been put in possession and dismissed the plaintiff's suit.

The lower Appellate Court modified the decree by giving possession to the plaintiff on his repaying the money received by him.

Defendants Nos. 1 to 3 and 10 preferred this second appeal.

The case first came on for hearing before (Subrahmania Ayyar and Sankaran Nair, JJ.), who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The plaintiff agreed to sell the property in suit on the 16th December 1895 to the tenth defendant and in pursuance of the agreement placed him in possession of the property, and the purchase money was paid by the tenth defendant to a creditor of the plaintiff as agreed between them.

On the 16th December a conveyance was executed by the plaintiff but in consequence of certain mis-statements therein it was not registered and thereupon the plaintiff promised to execute and register a proper conveyance but has not as yet done so. No time for the execution of this conveyance was fixed and there is no averment that specific performance was refused, unless such refusal is to be inferred from the plaintiff dispossessing defendants Nos. 1 to 3 in whose favour the tenth defendant had executed a registered sale deed in respect of the property. Such dispossession was in

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August 1898 and as the suit was brought on the 23rd November 1899, the claim for specific performance against the plaintiff for execution of a sale deed was *prima facie* not barred at the institution of the suit nor at the time the defendants filed their written statements, nor at the date of the decree of the Court of First Instance. It is urged on behalf of the appellants, defendants Nos. 1 to 3 and No. 10, that the agreement to sell, coupled with delivery of possession of the land and the payment of the purchase money in pursuance of the agreement, furnishes a complete answer to the plaintiff's claim to eject, and the contention is supported by several decisions of this Court, e.g., *Ukku v. Kutti*(1), *Pangutchan v. Parameswara Pattar*(2), *Ittappan v. Parangodan Nair*(3). A different view was, however, first taken in *Papireddi v. Narasareddi*(4), and that has been affirmed in *Ramasami Pattar v. Chinan Asari*(5) and *Achutan Nambudri v. Koman Nair*(6). The observations in *Papireddi v. Narasareddi*(4) were dissented from in *Begam v. Muhammad Yakub*(7) and doubted in *Ittappan v. Parangodan Nair*(3). In *Immudipattam Thirugnana Kondama Nakk v. Periya Dorasami*(8), the observations of the Judicial Committee in more than one place point to the view that if there is in favour of the defendant a valid contract specifically enforceable, that would give him a right to continue in possession, even though he has not obtained a registered instrument as required by law, e.g., the Transfer of Property Act, and that such a contract would be a good defence to a suit for possession by the party liable to perform the contract. The equitable considerations warranting such a conclusion would be found stated by Lord Selborne in *Maddison v. Alderson*(9), which is cited for another purpose in *Achutan Nambudri v. Koman Nair*(6). Where there is more than a mere agreement and possession has passed and purchase money been paid, it is rightly pointed out in *Karalia Nanubhai v. Mansukhram*(10), that equities necessarily arise notwithstanding that it is stated in section 54 of the Transfer of Property Act that a mere contract for the sale of immoveable property does not of itself create any interest in or charge on such property.

(1) I.L.R., 15 Mad., 401.
(3) I.L.R., 21 Mad., 291.
(5) I.L.R., 24 Mad., 449.
(7) I.L.R., 16 All., 344.
(9) L.R., 8 A.C., 467 at p. 475.

(2) 6 M.L.J., 33.
(4) I.L.R., 16 Mad., 464.
(6) 13 M.L.J., 217.
(8) I.L.R., 24 Mad., 377.
(10) I.L.R., 24 Bom., 400.

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Zimble v. Abrahams(1), may also be referred to as a very recent instance of the length to which Courts in England go in enforcing equities similar to that under consideration.

In this state of the authorities we refer for the decision of the Full Bench the question.

"Whether, assuming that the defendants' right to obtain specific performance by way of execution of a sale deed by the plaintiff was not, at the date of the suit, barred by limitation, the plaintiff is entitled to maintain this suit for the recovery of possession of the land agreed to be sold."

The case came on for hearing in due course before the Full Bench constituted as above.

P. Nagabhushanam for appellant.—The question is whether the defendants who are in possession under the circumstances set out in the Order of Reference and whose right to obtain a registered conveyance by suing for specific performance is not barred cannot resist the plaintiff's suit in ejectment.

The plaintiff is the vendor himself and not a person deriving title from him subsequent to the contract of sale with the defendants. The first point to be considered is whether there is anything in section 54 of the Transfer of Property Act to preclude the defendants in this case from relying on their possession and resisting the plaintiff's suit. It is submitted that prior to the Transfer of Property Act an oral agreement and possession were sufficient to pass property. The Transfer of Property Act, section 54, for the first time, prescribed a registered instrument in writing for the sale of immoveable property of the value of more than Rs. 100. But it did not take away the equities arising in favour of a person who pays the purchase money and is put in possession by the vendor under a promise of executing the registered conveyance later on.

Narsing Porkaet v. Mussamut Bewah(2), *Trimabrahm Raghavendra v. The Municipal Commissioners of Hubli*(3) and *Moidin v. Avaran*(4) are authorities for the view that prior to the Transfer of Property Act oral agreement and possession clothed the vendee

(1) L.R., (1908), I.K.B., 577.
(3) I.L.R., 8 Bom., 172.

(2) 5 B.L.R. App., 86.
(4) I.L.R., 11 Mad., 268.

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(1) I.L.R., 15 Mad., 401.
(3) I.L.R., 21 Mad., 291.
(5) I.L.R., 24 Mad., 449.
(7) I.L.R., 16 All., 344.
(9) L.R., 8 A.C., 467 at p. 475.

(2) 6 M.L.J., 33.
(4) I.L.R., 16 Mad., 464.
(6) 13 M.L.J., 217.
(8) I.L.R., 24 Mad., 377.
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(1) L.R., (1908), I.K.B., 577.
(3) I.L.R., 3 Bom., 172.

(2) 5 B.L.R. App., 86.
(4) I.L.R., 11 Mad., 263.

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with full rights to the property which could be enforced even against a subsequent vendee claiming under a registered conveyance. After the enactment of the Transfer of Property Act a contract of sale, payment of purchase money and possession may not be enough to convey the complete title in the property, but a defendant in possession can plead these in defence to a suit brought to eject him. Contract of sale alone will not do. But this coupled with payment of purchase money and transfer of possession passes an equitable interest in the property—*vide* the last clause of section 54, Transfer of Property Act. There the words “of itself” are significant. They are meant to preserve the equities arising in favour of a vendee who, though not possessed of a registered instrument, does not claim under a bare contract of sale but under that coupled with other circumstances. That this is the significance to be attached to the words “of itself” is clear from *Karalia Nanubhai v. Mansukhram*(1). The decision of their Lordships of the Privy Council in *Immudipattam Thirugnana Kondama Naik v. Periya Dorasami*(2) is conclusive on the point. At page 385 of the report their Lordships point out that if the defendant could show a right to have specific performance enforced that would be an answer to the plaintiff's claim. The Privy Council made a pronouncement in these terms upon the “point principally argued at the bar” and this is not a mere dictum. The equity thus recognized by the Courts in India as well as by the Privy Council is also enforced in England. See *Swain v. Ayres*(3) where Lord Esher observes that equity would regard the right to obtain a document as equivalent to the document itself; also *Zimble v. Abrahams*(4) and *Maddison v. Alderson*(5). The cases in which such a defence has been upheld are *Pangutchan v. Parameswara Pattar*(6), *Adakkalam v. Theethan*(7), *Ittiappan v. Parangodan Nair*(8) and *Karalia Nanubhai v. Mansukhram*(1). The cases in which a contrary view has been taken are *Papireddi v. Narasareddi*(9), *Ramasami Pattar v. Ohinnan Asari*(10), *Achutan Nambudri v. Koman Nair*(11), and *Lalchand v. Lakshman*(12).

- (1) I.L.R., 24 Bom., 460.
(3) L.R., 21 Q.B.D., 289.
(5) L.R., 8 A.C., 467 at p. 475.
(7) I.L.R., 12 Mad., 505.
(9) I.L.R., 16 Mad., 464.
(11) 13 M.L.J., 217.

- (2) I.L.R., 24 Mad., 377.
(4) L.R., (1903), 1 K.B., 577.
(6) 6 M.L.J., 33.
(8) I.L.R., 21 Mad., 291.
(10) I.L.R., 24 Mad., 449.
(12) I.L.R., 28 Bom., 466.

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All these cases are distinguishable on the ground that in them specific performance had either become barred or had been asked for and refused.

Why, on equitable considerations, the rights of such a vendee as the defendant in the present case should be recognised is pointed out in very forcible language in *Begam v. Muhammad Yakub*(1)—*vide* the observations at pages 350 and 358. The test is whether the defendant under such circumstances could be sued as a trespasser for mesne profits for the period during which he was in possession. It would be absurd to make him liable for mesne profits (*vide* Story's 'Equity Jurisprudence,' section 761). The same learned author shows how if a plaintiff should be allowed to succeed in such a case what a wide door for fraud would be opened and how a person would be allowed to take advantage of his own wrong—*vide* section 759. No separate suit by the defendant for enforcing specific performance is necessary—*vide* *Adakkalam v. Theethan*(2), *Kanharankutti v. Vathotti*(3), *Ukku v. Kutti*(4), *Krishna Menon v. Kesavan*(5). The recognition of such equitable rights is not unknown to the law of this country. Benami transactions so freely recognized in this country are illustrations of the provisions of section 54 of the Transfer of Property Act not being literally enforced—see also cases under section 316, Civil Procedure Code. Though no title vests in a purchaser at a Court sale until the sale has been confirmed, still it has been held that this does not prevent a lesser equitable interest vesting in him on the sale taking place (*Dagdu v. Panchamsing Gangaram*(6) and *Chiddo v. Piari Lal*(7)).

Counter-claim can be entertained by the Courts in this country when it is inequitable to refer the defendant to a separate suit (*Stephen Clark v. Ruthnavaloo Chetti*(8), *Kishorchand Champal v. Madhowji Visram*(9), and *Dobson and Barlow v. The Bengal Spinning and Weaving Company*(10)).

K. Subrahmanya Sastri for the respondent.—Section 54 of the Transfer of Property Act lays down that a registered instrument is the only mode by which the ownership should pass from the vendor

- (1) I.L.R., 16 All., 344.
(3) I.L.R., 13 Mad., 490.
(5) I.L.R., 20 Mad., 305.
(7) I.L.R., 19 All., 188.
(9) I.L.R., 4 Bom., 407.

- (2) I.L.R., 12 Mad., 505.
(4) I.L.R., 15 Mad., 401.
(6) I.L.R., 17 Bom., 375 at p. 379.
(8) 2 M.H.C.R., 296 at p. 303.
(10) I.L.R., 21 Bom., 126 at p. 135.

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when the value is more than Rs. 100, nothing short of a registered deed will give any right to the vendee to hold possession against the vendor. The words "of itself" in the last clause of section 54, do not import that in addition to a mere contract, if there is possession in pursuance of the contract an interest or charge in the immoveable property will be created. They were inserted to prevent rights from accruing in the immoveable property whatever other rights the contract may confer upon the vendee. The cases decided prior to the Transfer of Property Act such as *Moidin v. Avaran*(1) and *Narsing Porkaet v. Mussamut Bewah*(2) are no authorities at all, as the policy of the Act is to sweep away all equitable considerations in favour of the vendee and substitute a registered deed as the sole mode of conveyance of title to lands in this country.

The section has been amended by Act VI of 1900 thus even when Rs. 50 is the value of the property a registered deed has become necessary under it. This principle was first decided in *Pappireddi v. Narasareddi*(3), though subsequently doubted in *Ittappan v. Parangodan Nair*(4) and *Pangutchan v. Parameswara Pattar*(5) and was distinguished in *Begam v. Muhammad Yakub*(6). In *Ramasami Pattar v. Chinnan Asari*(7) Shephard and Bhashyam Ayyangar, J.J., supported the principle which is also followed by Benson and Bhashyam Ayyangar, J.J., in *Achutan Nambudri v. Koman Nair*(8). The dictum of Lord Hobhouse in *Immudipattam Tirugnana Kondama Nair v. Periya Dorasami*(9), is at the most an obiter dictum. It was not necessary for the decision of that case. The cases reported in *Adakkalam v. Theethan*(10), *Ittappan v. Parangodan Nair*(4) are no authorities before the Full Bench. Some of the cases based upon equitable considerations were considered in *Ramasami Pattar v. Chinnan Asari*(7) and not followed. These Malabar cases are all cases of leases in which the tenants were holding lands under previous leases and paid rents. The defence that there was subsequent contracts to renew

(1) I.L.R., 11 Mad., 263.

(3) I.L.R., 16 Mad., 466.

(5) 6 M.L.J., 33.

(7) I.L.R., 24 Mad., 449 at pp. 456, 462.

(8) 18 M.L.J., 217.

(10) I.L.R., 12 Mad., 505.

(2) 5 B.L.R. App., 86.

(4) I.L.R., 21 Mad., 291.

(6) I.L.R., 16 All., 344.

(9) I.L.R., 24 Mad., 377.

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the lease was allowed, though the law required registration to evidence it. *Begam v. Muhammad Yakub*(1) is a case of presumption. *Karalia Nanubhai v. Mansukharm*(2) was based upon the lien preserved by 55, clause 6 (b) of Transfer of Property Act.

The English cases quoted are of no authority in India in the face of section 54, Transfer of Property Act. The English Courts allow cross claims for which there is no provision in Civil Procedure Code. These are based on the principle of part performance of a parol contract. To prevent frauds, exceptions were created upon the Statute of frauds. In Maxwell on 'Interpretation on Statutes,' page 360, and Story on 'Equity,' section 761, it is said that all these equitable principles are now being ignored, as those exceptions resulted in perpetuation of further frauds which they were intended to prevent. In *Ramasami Pattar v. Chinnan Asari*(3), the dictum of Lord Selborne in *Maddison v. Alderson*(4) is relied on to this effect. To insist upon the necessity of conveyance is the safest method of preventing all frauds, though it may result in hardship in individual cases. The cases quoted in Maxwell support this contention. *Swain v. Ayres*(5) is a case of a tenant who was in possession and paid rent. The principle there laid down that a right to obtain a document is as good as the document itself will dispense with the necessity of conveyance in all cases and is opposed to the spirit and letter of Transfer of Property Act. In *Zimble v. Abrahams*(6) specific performance was actually granted. In all Indian cases in which this defence is allowed, section 54 of Transfer of Property Act is ignored. They are no authorities before a Full Bench.

There is really no hardship. The vendor is given a right to bring a suit for specific performance within three years from the date of refusal, article 113. If he sleeps over his rights, he must suffer. *Lalchand v. Lakshman*(7) lays down the course to be adopted in the present case. Since the defendant did not bring a suit for specific performance up to date and if a suit is brought now he would be barred, he must give up the property recovering the sale price which he paid.

(1) I.L.R., 16 All., 344.

(3) I.L.R., 24 Mad., 449.

(5) L.R., 21 Q.B.D., 289.

(7) I.L.R., 28 Bom., 466.

(2) I.L.R., 24 Bom., 400.

(4) L.R., 8 A.C., 474.

(6) L.R., (1903), I.K.B., 577.

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The Court expressed the following

OPINION (Sir ARNOLD WHITE, C.J.).—In this case I have come to the conclusion, though not without some doubt, that our answer to the question which has been referred to us should be in the affirmative.

There is much to be said in support of the view that notwithstanding the express words of section 54 of the Transfer of Property Act, it is inequitable to apply the section as against a party who is in possession and who, if he had sued for specific performance of the contract to sell, would have been entitled to a decree.

On the other hand in dealing with the question which arises in this case, I think it is legitimate to take into account the considerations of public policy on which the requirements laid down in section 54 of the Transfer of Property Act are based. In enacting section 54, it was, I take it, the intention of the Legislature, by means of compulsory registration to minimise as far as possible the chances of litigation and to reduce the opportunities for perjury in connection with sales of immoveable property.

The application of the strict letter of the law untempered by equitable considerations may, no doubt, at first, result in hardship to individuals. But as soon as it is known to be well settled that the strict letter of the law will be applied, cases of individual hardship will cease to occur, and full effect will be given to the considerations of public policy on which the enactment in question is based.

The application of the letter of the law leads to certainty of title and to a diminution of the opportunities for perjury. The tempering of the letter of the law by recognizing equities which would take a case out of the statute, leads in precisely the opposite direction.

The terms of the enactment in connection with the requirement of a registered instrument, are perfectly clear and unambiguous. Section 54 of the Transfer of Property Act defines "sale" as a transfer of ownership in exchange for a price paid or promised, or part paid and part promised, and the section then proceeds to enact that, in the cases mentioned, the transfer can be made only by a registered instrument.

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The section further provides that a contract for sale "does not, of itself, create any interest in or charge on" immoveable property. We are asked to read this provision as enacting by implication that a contract for sale coupled with possession, does create an interest in or charge on the property, even although the requirements of the section with reference to a registered instrument have not been complied with. Such a construction seems to me to be altogether inconsistent with the express enactment in the earlier part of the section.

The object of the provision, as it seems to me, was to prevent the question being raised as to whether the law of England as to the legal effects of a contract of sale (see for instance, *Edwards v. West*(1), *In re Adams* and *The Kensington Vestry*(2)) applied in this country.

The Transfer of Property Act purports to codify certain parts of the law relating to the transfer of property by act of parties, and it is not in accordance with sound canons of construction or with public policy to read into such an enactment propositions of equity which have been laid down with reference to some other enactment not altogether in *pari materia*. The English Courts are bound by decisions in connection with the Statute of Frauds, which are based upon the "equity of statute."

We are not so bound, and I do not think we are under any obligation in law to engraft these decisions, whenever they can be said to be in point, on to the enactment in question; and on grounds of public policy I do not think it desirable to do so. Here we have more or less a clean slate. In England it is otherwise. In dealing with the principles of equitable construction, Mr. Maxwell observes (Maxwell on the 'Interpretation of Statutes,' 4th edition, p. 390):—

"This principle of equitable construction has, however, fallen 'into discredit. It was condemned, indeed, by Lord Bacon, who 'declared that *non est interpretatio sed divinatio, quae recedit a litera* ; Lord Tenterden lamented it and pronounced it dangerous; and it may now be considered as altogether discarded as regards the construction of most modern statutes. Statutes are 'now to be considered as framed with a view to equitable as well as legal doctrines.' In connection with the question of public

(1) L.R., 7 Ch.D., 858.

(2) L.R., 27 Ch.D., 394.

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policy, I may cite the following passage from Story's 'Equity Jurisprudence' (see Story, para. 765 on p. 505).

"It must be admitted that the exceptions thus allowed do greatly trench upon the policy and objects of the Statute of Frauds; and, perhaps, there might have been as much wisdom originally in leaving the statute to its full operation, without any attempt to create exceptions, even in cases where the statute would enable the party to protect himself from a performance of his contract through a meditated fraud. For, even admitting that such cases might occur, they would become more and more rare as the statute became better understood; and a partial evil ought not to be permitted to control a general convenience. And, indeed it is far from being certain that these very exceptions do not assist parties in fraudulent contrivances, and increase the temptations to perjury, quite as often as they do assist them in the promotion of good faith and the furtherance of justice. These exceptions have also lead to great embarrassments in the actual administration of equity; and although in some cases one may clearly see that no great mischiefs can occur from enforcing them, yet, in others, difficulties may be stated in their practical application which compel us to pause and question their original propriety."

The Indian authorities upon the question raised in this case are in conflict.

In *Ukku v. Kutti*(1) this Court laid down the broad proposition that whatever right a party in the position of the defendant in the present case could assert as plaintiff, was also available to him as a ground of defence. In *Ittappan v. Parangodan Nair*(2), the plaintiff brought his suit in ejectment before the expiration of the time within which the defendants might have sued for specific performance of the contract to renew the lease. This Court held that to allow the plaintiff to eject the lessee would be to give the plaintiff a decree in fraud of his contract of lease.

In this case the learned Judges dissented from an earlier decision in *Papireddi v. Narasareddi*(3), in which there had been an oral contract for sale, possession given to the defendant, and part payment of the purchase money made, but the Court held that

(1) I.L.R., 15 Mad., 401.

(2) I.L.R., 21 Mad., 291.

(3) I.L.R., 16 Mad., 464.

the vendor was entitled to evict on the ground that there had been no registered instrument. The point was considered by Sir Bhashyam Ayyangar in the course of his judgment in *Ramasami Pattar v. Chinnan Asari*(1). The learned Judge (p. 466) after referring to the law of England under which, in certain cases, a Court of Equity would act on the supposition that what ought to be specifically performed had been performed and give relief on that supposition, observes that the same course may be adopted in this country "as in fact it is in cases in which it can be done without contravening the express and fundamental provisions of the Transfer of Property Act or of any other positive enactment."

In *Achutan Nambudri v. Koman Nair*(2), it was held by this Court that the fact that the party in possession was in a position to enforce specific performance of the contract, was no defence to an action of ejectment, if the requirements of the Transfer of Property Act with regard to the registration had not been complied with.

The case (*Karalia Nanubhai v. Mansukhram*(3)) may perhaps be distinguished on the ground that in that case the purchaser's title was perfected by a registered conveyance which was executed before the case was decided by the Court of First Instance. *Lalchand v. Lakshman*(4) is a clear authority in support of the view (although as a matter of fact there had been in that case a suit for specific performance by the defendant which was dismissed) that in a case like the present the express provisions of the statute must prevail.

In *Begam v. Muhammad Yakub*(5), a Full Bench of the Allahabad High Court took the same view as was taken by this Court in *Ittappan v. Parangodan Nair*(6), subject to this limitation that the defendant must prove that he had at a proper time and place tendered a proper conveyance of the property to the seller (the report says "purchaser" but this is an obvious misprint) for execution by him (see p. 350).

In the course of the judgment of the Privy Council in *Imudipattam Thirugnana Kondama Naik v. Periya Dorasami*(7),

(1) I.L.R., 24 Mad., 449.

(3) I.L.R., 24 Bom., 400 at p. 402.

(5) I.L.R., 16 All., 344.

(7) I.L.R., 24 Mad., 877.

(2) 13 M.L.J., 217.

(4) I.L.R., 28 Bom., 466.

(6) I.L.R., 21 Mad., 291.

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an observation was made (p. 384) which, no doubt, supports the view that in a case like the present the defendant has a good equitable defence notwithstanding the fact that the requirements of the Transfer of Property Act have not been complied with. In dealing with the contention raised before the Judicial Committee that, though the mortgage in question fell short of an actual transfer, it showed a good contract for one, and that the defendant could call upon the plaintiff to "implement" the contract, their Lordships observe that if such a right existed it would be an answer to the plaintiff's claim and the exact form in which it could be enforced, need not be considered. From the language of the judgment it would seem that their Lordships had present to their minds the Scotch law of implement. This is part of the ordinary jurisdiction of Scotch Courts, whilst in England the remedy of specific performance is a matter of discretion, and defences are admitted which would be inadmissible according to the doctrines and practices of the Courts of Scotland. (See Brodie Innes' 'Corporation Principles of the laws of England and Scotland,' p. 763.) This being so, it may perhaps be said that the observations do not affect the present case. But, however, this may be, the observations are *obiter* and I do not think they preclude us from holding that effect cannot be given to the equities in the defendant's favour in the present case in contravention of the express provisions of the Transfer of Property Act.

We have to choose between laying down a rule which, in every case in which a purchaser is in possession under an oral or unregistered agreement and the vendor seeks to eject him, will involve an enquiry as to whether the circumstances of the particular case are such that the defendant is entitled by way of equitable defence to a decree for the specific performance of the oral or unregistered agreement, and the rule that in all cases the express words of the statute must prevail. I do not think we are precluded by authority from adopting the latter rule, which carries out what appears to have been the intention of the Legislature and seems to me to be in accordance with public policy.

I would answer the question which has been referred to us in the affirmative.

SUBRAHMANYA AYYAR, J.—The undoubted policy of the law as enacted by section 54 of the Transfer of Property Act, was to

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secure the public registry of, *inter alia*, sales of immoveable property of the value of Rs. 100 and upwards. The provision in the section that a contract for sale does not of itself create any interest in or charge on such property, was to guard against that policy being defeated, as it would obviously be, if the principle that equity takes that as done which ought to have been done, could be invoked in favour of a party who has not secured the prescribed registered proof of his purchase. This being so, it would follow that in a suit like the present in ejectment by the plaintiff, whose title is admitted, the defendant cannot succeed by merely setting up a contract on the part of the plaintiff with himself to sell the disputed land, and showing that that contract is specifically enforceable. To hold otherwise would be to ascribe to the contract the very effect denied to it by the statute in the most explicit terms. Nor is there ground for saying that part performance by delivery of possession, would warrant the same being relied on as a valid defence to such an action. The charge provided for by section 55 (6) (b) of the Transfer of Property Act in favour of a purchaser paying the price or a portion thereof, when considered with the absence of any provision for the case of part performance by delivery of possession, shows that the latter was not intended to give rise to any interest in the property in the buyer, more especially as a sale of immoveable property less than Rs. 100 in value may be made by delivery alone. This aspect of questions such as the present has been either not sufficiently attended to or altogether lost sight of in the decisions in this country relied on to the contrary.

It was however urged that to allow a seller who has so far acted upon the contract as to let the buyer into possession pending the execution of the conveyance, to eject him when he is not in fault, is to enable the former to act in fraud of his contract and that as the Courts of this country are Courts both of law and equity the decisions just referred to ought to be followed on the analogy of the rule of equitable construction adopted in regard to the Statute of Frauds. But as pointed out in *Ramasami Pattar v. Ohinnan Asari* (1), such a mode of construction has been disapproved of by high authorities and can no longer be resorted

(1) I.L.R., 24 Mad., 449 at p. 462.

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to in dealing with clear and unambiguous provisions of modern statutes like those in question (see Maxwell on 'Interpretation of Statutes,' 3rd edition, pp. 362, 363). A remarkable instance of the refusal by the English Courts virtually to modify imperative statutory provisions on the ground of equity however clear, is *Young & Co. v. The Mayor and Corporation of Royal Leamington Spa*(1). There an urban authority governed by sub-section (1) of section 174 of the Public Health Act, 38 and 39 Viet., c. 55, which provides that "every contract made by an urban authority whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority," was held not liable under an executed contract of which they had had the full benefit, because the contract was not under seal. In the Court of Appeal Lindley, L.J., observed: "It may be that this "is a hard and narrow view of the law; but my answer is that "Parliament has thought it expedient to require this view to be "taken, and it is not for this or any other Court to decline to give "effect to a clearly expressed statute, because it may lead to "apparent hardship." Alluding to the same point Lord Blackburn in the House of Lords said: "It is true that this works great "hardship upon the now appellants. They had an agreement but "it was not sealed; and though it is possible that if the agreement "had been under seal the defendants might have established a "defence on the merits to all or part of what is claimed; it is hard "on the appellants that they should not be allowed to raise the "question. It is, however, for the Legislature to determine "whether the benefits derived by enforcing a general rule are or "are not too dearly purchased by occasional hardships. A Court "of Law has only to inquire—What has the Legislature thought "fit to enact?" This was of course as strong an instance of hardship, nay, injustice to the appellants in the case, as can be imagined, for, though they had executed their part of the contract, they lost everything and were remediless, while here the effect of the view we are taking would only be to make the defendant resort to his proper remedy, viz., a suit for specific performance in order to complete his title.

No doubt the same result could be attained in this very suit if the law of procedure in this country permitted the Courts to

(1) L.R., 8 A.C., 517.

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enforce specific performance on a counter-claim by the defendant. That however it does not. But even as the law stands in this respect, the defendant could have saved himself from all difficulty had he made the claim for specific performance the subject of a separate suit pending this action in ejectment, for, then, the disposal of the latter might have been postponed until the result of the other suit was known or the two actions dealt with together and decided with reference to the success or failure of the claim for specific performance. Be this as it may, the right doctrine would seem to be that applied in *Achutan Nambudri v. Koman Nair*(1), with reference to the instance of mortgage there in question, following *Papireddi v. Narasareddi*(2) and *Ramasami Pattar v. Chinman Asari*(3). But it must be admitted that the observation in the judgment of Lord Hobhouse in *Immudipattam Thirugnana Kondama Naik v. Periya Dorasami*(4) seems to go far to uphold the contention that the contract for sale may be set up as an answer to a suit in ejectment such as the present. This opinion cannot however be taken to be an actual decision. It is by no means clear, that the circumstance that a definite period of limitation is prescribed for the enforcement of a claim for specific performance in this country, was present to the mind of his Lordship. Now, in the view suggested by him, the defence will have to be allowed, in all cases where the right to specific relief is not barred by limitation, when the defendant enters on his pleading. But this period of limitation may expire pending the suit, and if the suit results in its dismissal, the defendant would either win but to be dispossessed in a fresh suit, or obtain a title notwithstanding he has no registered conveyance as prescribed by law. It is difficult to believe that the framers of the Transfer of Property Act contemplated that such a state of things could be rightly brought about.

I would therefore answer the question submitted in the affirmative.

BENSON, J.—I am of opinion that our answer to the question referred for our decision must be in the affirmative.

As shown in the order of reference, this Court has taken different views at different times according as it looked at the

(1) 13 M.L.J., 217.
(3) I.L.B., 24 Mad., 449.

(2) I.L.R., 16 Mad., 464.
(4) L.R., 28 I.A., 46 at p. 53.

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(4) L.R., 28 I.A., 46 at p. 53.

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question mainly from the legal or from the equitable point of view. The true rule, however, seems to be that where the words of a statute are clear and unambiguous it is the duty of the Courts to give effect to them, and not to allow the statute to be made of no effect by introducing what may appear, in particular cases, to be equitable considerations, but which, in the long run, are more likely to lead to inequities and litigation and perjury than if it is known that the letter of the written law will be consistently enforced in all cases. As observed by the Privy Council in the case of *Gokul Mandar v. Pudmanund Singli*(1). "The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or to go outside the letter of the enactment according to its true construction."

Now under section 54 of the Transfer of Property Act a sale of immoveable property of the value of Rs. 100 and upwards can be made only by a registered instrument, and the section expressly enacts that a contract for sale "does not, of itself, create any interest in, or charge on, such property." It is argued, however, that the contract for sale, accompanied as it is in the present case by delivery of possession, that is by a part performance, does give the purchaser a lien on the property and such an interest as is sufficient to enable him to resist a suit in ejectment by the vendor. No doubt there is an observation of the Privy Council in the case of *Immudipattam Thirugnana Kondama Naik v. Periya Dorasami*(2), which lends support to this contention but I do not think that it is more than an *obiter dictum*. There is nothing in the Transfer of Property Act to support the contention, and the fact that no lien on or interest in the property is given by the Act in such a case, while a charge is expressly given by section 55 (6) (b) in the case of part performance by payment of the price, or a portion of the price, leads very clearly to the inference that the Legislature did not intend that delivery of possession should, like part payment, create a lien on, or an interest in, the property. To hold otherwise would nullify the policy of the Act, and give dishonest persons an opportunity for evading its requirements. On the other hand to hold that a contract for sale even when accompanied by delivery of possession does not create a lien on or

(1) L.R., 29 I.A., 196.

(2) I.L.R., 24 Mad., 377.

an interest in the property, does not lead to any real hardship, for the purchaser can resort to his proper legal remedy by instituting a suit for specific performance of the contract—a remedy to which he must, in any case, resort in order to complete his title and secure legal evidence of it—and he can then apply to have the trial of the ejectment suit stayed pending the trial of his own suit for specific performance.

Looking to the express terms and to the manifest policy of the Transfer of Property and Registration Acts in force in India, I think that our answer to the reference should be in the affirmative.

The appeal came on for final hearing before (Subrahmaniam Ayyar and Sankaran Nair, JJ.), when the Court delivered the following

JUDGMENT.—Following the Full Bench ruling we dismiss the second appeal with costs.

The memorandum of objections is also dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

MAMMIKKUTTI AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

PUZHAKKAL EDOM AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act XV of 1877, sched. II, arts. 62, 97, 116—Transfer of Property Act IV of 1882, ss. 55 (2) and 108 (c)—Art. 116, sched. II of the Limitation Act will apply only when the transaction is one to which section 55 (2) or 108 (b), of the Transfer of Property Act will apply and a covenant for title or quiet enjoyment can be implied.

The first defendant, in September 1897 granted, in consideration of an advance, a registered karar to P, the predecessor in title of the present plaintiff, in the following terms:—

* Appeal No. 38 of 1905, presented against the decree of M.R.Ry. S. Raghunathaiya, Subordinate Judge of South Malabar at Palghat, in Original Suit No. 27 of 1903.

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"Deed of consent or permission granted to by
In consideration of this amount, the trees standing shall be cut
down at your expense during a period of 6 years from this date, with the exception
of teak and blackwood. For every cart-load of timber so removed
you are to pay a kuttikanam of Rs. 2-4-0 and on those timber the seal of the
Etam shall be impressed without delay During the period of 6
years, the Etam shall not grant any permission to others to cut trees
You have the right to cut down trees and none whatever to the land."

The first defendant and the other defendants formed a Tarward, and in a suit
brought on behalf of the Tarward against P and the first defendant, it was
declared that the karar was not binding on the Tarward and P was restrained
from cutting timber. The present suit was instituted by P to recover personally
from the first defendant and from the Tarward properties the amount advanced
with interest as damages:

Held, that the suit so far as the Tarward properties were concerned was *res
judicata* by reason of the decision in the previous suit.

Held also, that the suit as against the first defendant was barred by limitation.
The article applicable to the suit is either article 62 or article 97 of schedule II of
the Limitation Act. The document is not a sale or lease of immoveable property
within the definition of those terms in the Transfer of Property Act and a
covenant for title or for quiet enjoyment cannot be implied under section 55 (2)
or section 108 (c) of the Act.

Article 116 of schedule II of the Limitation Act does not apply to the case.

The document did not create a mortgage or charge on immoveable property.
It is no more than an exclusive license to cut trees.

A document may create an interest in land and bring it within the provisions
of the Registration Act. The covenant for title will not necessarily be implied
in such cases, unless it is one of the transactions in which the covenant can be
implied under the Transfer of Property Act.

Seeni Chettiar v. Santhanathan Chettiar, (I.L.R., 20 Mad., 58), followed.

SUIT to recover damages. The defendants Nos. 1 to 68 were
members of a Tarward. The first defendant alleging he was Kar-
navan of the Tarward executed in favour of Pakru, the predecessor
in title of the plaintiffs, in September 1897, a karar, whereby,
in consideration of certain moneys advanced by Pakru, he granted
to him the exclusive right of cutting trees in a forest belonging
to the Tarward. Subsequently in Original Suit No. 59 of 1897
brought on behalf of the Tarward, in which Pakru and the first
defendant were defendants, it was held that the first defendant
ceased to be Karnavan in 1895, that the karar was not binding on
the Tarward, and Pakru was restrained from cutting trees in the
forest.

The plaintiffs instituted this suit to recover from the first
defendant, personally, and from the Tarward properties, the
moneys advanced under the karar with interest. The suit was

dismissed by the Sub-Judge on the ground that the suit against MAMMIKKUTTI
the first defendant was barred under article 62 or 97 of schedule PUZHAKKAL
II of the Limitation Act and as against the other defendants, EDM.
it was *res judicata* by reason of the decision in Original Suit
No. 59 of 1897.

Plaintiffs preferred this appeal.

The Hon. Mr. P. S. Sivaswami Ayyar and K. R. Subrahmania
Sastri for first appellant.

T. R. Ramachandra Ayyar for first respondent.

J. L. Rosario for second respondent.

M. Govindan Nair for third to tenth, thirteenth to eighteenth
and twentieth to twenty-seventh, twenty-ninth and thirty-first to
sixty-fifth respondents.

JUDGMENT.—In Original Suit No. 59 of 1897 to which Pakru,
the plaintiff's predecessor in title, was a party, an injunction was
granted restraining Pakru from interfering with the forest in
question. The injunction was granted upon the ground that the
karar (exhibit "G") which had been granted by the present first
defendant to Pakru was not binding on the Tarward. The
plaintiffs now claim damages under this same agreement from the
first defendant and the members of the Tarward. The finding
that the karar on which the plaintiffs now sue is not binding on
the parties whom it purports to bind renders the question raised in
the sixth issue as to the binding effect of the karar *res judicata*
as between the plaintiffs and the defendants other than the first
defendant.

A new point was taken by Mr. Sivaswami Ayyar on behalf
of the appellants which was not raised in the pleadings and was
not taken in the Court of First Instance. Mr. Sivaswami Ayyar
argued that the legal effect of exhibit "G" was to render the trees
therein referred to security for the advances which had been made
by Pakru to the Tarward, and that a charge had been created
on the trees in favour of the plaintiffs. So far as the wording
of exhibit "G" goes, there is nothing to suggest that the parties
intended that it should operate as a mortgage. Mr. Sivaswami
Ayyar however relies on the word "kuttikanom" which occurs
in the body of the document. No doubt one of the meanings
of "kuttikanom" is "mortgage of trees," and if the instrument
had been described as a kuttikanom agreement we might have
been prepared to take the view that it was intended to operate as

MAMMIKUTTI v. PUZHAKKAL EDM. a mortgage. But the word in the document in question is used, as it seems to us, as meaning "stamp fee" and nothing more, and we do not think that the instrument operated, or was intended to operate, as a mortgage. As regards the first defendant the question is—is the plaintiffs' personal remedy against him barred by limitation? It was held by the Sub-Judge that the claim was time barred, the period of limitation being 3 years under article 62 of the second schedule of the Indian Limitation Act. It was contended before us that article 116 was applicable and that the period of limitation was 6 years. The question is—is the karar exhibit "G" to be construed as containing an implied covenant for title or for quiet enjoyment of which there has been a breach? There can be no doubt that exhibit "G" is an exclusive license to cut certain trees (subject to the right of the Tarward to cut for their own necessities). Is it anything more? We have already held that it is not a mortgage. Is it a sale of immoveable property? If it is, there is, under section 55 (2) of the Transfer of Property Act, a covenant for title. If not a sale, is it a lease of immoveable property? If it is, there is, under section 108 (c) of the Transfer of Property Act, a covenant for quiet enjoyment. By section 3 of the Act "immoveable property" is defined as not including standing timber, growing crops, or grass. The contention on behalf of the appellants was that the definition only applied to standing timber which it was the intention of the parties should be immediately severed and delivered as a chattel. It was also contended that there was under exhibit "G" a conveyance of an interest in immoveable property inasmuch as a period of 6 years was allowed for the cutting of the trees and during this period the trees would derive sustenance from the soil. In *Seeni Chettiar v. Santhanathan Chettiar*(1) an instrument somewhat similar to the karar in the present case was considered by a Full Bench. It was held that the instrument there in question created an interest in land. The case was first heard before Shephard and Best, JJ. Shephard, J., was of opinion that the instrument was a lease. Best, J., while expressing no opinion as to this, was of opinion that it created an interest in immoveable property; but the Judges differed on the question whether the document was admissible in evidence without having been registered. On a

(1) I.L.R., 20 Mad., 58.

reference to a Full Bench, Subrahmania Ayyar, J., was of opinion that the instrument was not a lease, but that it did create an interest in immoveable property. The two other learned Judges who constituted the Court agreed that it created an interest in immoveable property. MAMMIKUTTI v. PUZHAKKAL EDM.

For the reasons stated by Subrahmania Ayyar, J., in dealing with the instrument then in question, we are of opinion that the karar in the present case is not a lease.

In *Seeni Chettiar v. Santhanathan Chettiar*(1) the decision of the Court was with reference to the provisions of the law of Registration and it does not follow that an instrument which is to be held to create an interest in land for the purpose of that law is an instrument into which there must be imported a covenant for title or for quiet enjoyment. The transactions with regard to which these covenants are to be deemed to exist are defined in the Transfer of Property Act, and if the transaction is not one of those so defined we do not think either covenant can be implied. It is not necessary for us to consider whether exhibit "G" is a mere license or a license coupled with a grant. The question whether the grant, if any, creates such an interest in immoveable property as to carry with it an implied covenant for title or for quiet enjoyment, must, as it seems to us, be decided with reference to the provisions of the Transfer of Property Act. The grant, if any, in the present case does not fall within any section of that Act, which provides for such an implied covenant.

Further, there appear to be good grounds on which the instrument in question in *Seeni Chettiar v. Santhanathan Chettiar*(1) can be distinguished from the karar in the present case for the purposes of the point we have to decide, if not for the purposes of the Registration law. The former conveyed to the grantee not only the right to cut trees but also the grass, korai, gum, etc., on the bank and bed of the tank on which the trees stood. The latter merely gave the right to cut and remove the trees, certain classes of trees being excepted. The latter also contained express provisions that the licensee or grantee should have the right to cut down the trees alone and no right whatever in the land, and that the amount advanced should not be recovered but should be settled by the removal of trees only.

(1) I.L.R., 20 Mad., 58.

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EDOM.

We are of opinion that the case is governed by article 62 or article 97 of schedule II of the Indian Limitation Act and that the period of limitation is 3 years. The appeal is dismissed with two sets of costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

RAJU GRAMANY (DEFENDANT), APPELLANT,

v.

AMMANI AMMAL (PLAINTIFF), RESPONDENT.*

Hindu Law—Mitakshara—Stridhanam, devolution of—Sister takes precedence over sister's son—Nature of right.

Under the Mitakshara Law, where a woman not married in any of the approved forms dies issueless, her stridhanam property, in the absence of nearer heirs, passes to the sister in preference to the sister's son.

The Mitakshara is the paramount authority in this Presidency and in the absence of a consensus of opinion among the commentators, and where there is no evidence of usage to the contrary, the general doctrine of Mitakshara Law must prevail over the Smriti Chandrika. A woman taking stridhanam property of a deceased female by inheritance will take only a limited interest in such property.

Muthappudayan v. Ammani Ammal, (I.L.R., 21 Mad., 58 at p. 62), referred to.
Salemma v. Lutchmana Reddi, (I.L.R., 21 Mad., 100 at pp. 103 and 104), referred to.

PLAINTIFF was the sister of one Thayamma who died on 14th March 1902 leaving the plaint property her self-acquisition. Defendant was plaintiff's son. Plaintiff claimed the property and the title-deed (sale-deed in favour of Thayamma) in the possession of defendant, by right of inheritance, alleging that she was the next heir to the said Thayamma.

The defendant contended that the plaintiff was not the next heir of the deceased.

The lower Court passed a decree in favour of the plaintiff.
The defendant preferred this appeal.

V. Masilamani Pillai for appellant.

Mr. Joseph Satya Nadar for respondent.

* City Civil Court Appeal No. 17 of 1905, presented against the decree of M.R.Ry. C. Jambulingam Mudaliar, City Civil Judge of Madras, in Original Suit No. 242 of 1904.

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GRAMANY
v.
AMMANI
AMMAL.

JUDGMENT.—The property in dispute, a house, was admittedly the acquisition of the deceased owner Thayammal, a woman of the Sudra class. In the absence of any evidence on the point, the Judge rightly took the property to have been Thayammal's absolute estate descendible as her *stridhanam* in the general and non-technical sense of the term according to the Mitakshara. The Judge in our opinion also rightly held that as between the only relatives of hers surviving her, the plaintiff the sister of Thayammal was entitled to succeed in preference to the defendant who is the plaintiff's son, in the view adopted by the Judge and not seriously controverted in the argument before us, that Thayammal had not been married in any of the approved forms. The paramount authority on a question such as this is of course in this Presidency the Mitakshara, and, according to it, the plaintiff as the daughter of Thayammal's father takes precedence over the defendant, his daughter's son, though the estate which the plaintiff thus takes would be but a limited estate. On behalf of the defendant, our attention was drawn to the text of Brihaspati quoted and explained in *Venkatasubramaniam Chetti v. Thayarammah* (1) and it was contended that according to it the plaintiff has no right to Thayammal's estate as against the defendant who is named in the text while she is not. This text no doubt is cited in Smriti Chandrika, the Madhaviya, the Saraswativilasa and the Vyavaharanirnaya which are of more or less authority in this Presidency. The comments upon the text in the last work show how differently it has been interpreted. In no view does the text seem reconcilable with the rules of descent deducible from the Mitakshara and it is therefore not surprising that Vigneswara omits all reference to it. The reference to the text in the other commentaries does not suggest any consensus among the authors of them as to the precise application of the text. Nor is there anything to show that, as a matter of usage, the text is followed in circumstances like those of the present case in preference to the general mitakshara doctrine as applicable thereto. Having regard to the considerations relied on in *Muthappudayan v. Ammani Ammal* (2) and *Salemma v. Lutchmana Reddi* (3), we think we should hold that the Smriti Chandrika which alone is capable of being understood as giving the relations mentioned in the text a definite

(1) I.L.R., 21 Mad., 263 at p. 267. (2) I.L.R., 21 Mad., 58 at p. 62.
(3) I.L.R., 21 Mad., 100 at pp. 103, 104.

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place in the line of heirs in the way pointed out by Sir Gurudas Banerjee ('Hindu Law of Inheritance and Stridhana,' 2nd edition, pp. 373 and 389), viz., immediately after the husband or the parents as the case may be, cannot outweigh the Mitakshara, and, as already stated, under the latter the plaintiff as the daughter of Thayammal's father has a better title than the defendant who is only his daughter's son. The appeal fails and is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

RAMASWAMY CHETTY (PLAINTIFF), APPELLANT,

v.

THE MUNICIPAL COUNCIL, TANJORE (DEFENDANTS),
RESPONDENTS.*

District Municipalities Act (Madras) IV of 1884, s. 45—Contract not signed in accordance with section unenforceable.

A contract purporting to be made by a Municipality but not signed by the Chairman or Vice-Chairman and a Councillor as required by section 45 of Act IV of 1884 is not binding on the Municipality.

Radha Krishna Das v. The Municipal Board of Benares, (I.L.R., 27 All., 592), followed.

Where the contract is not so signed, the Municipality cannot be rendered liable on the ground of executed consideration.

Young & Co. v. The Mayor and Corporation of Royal Leamington Spa, (L.R., 8 A.C., 517), followed.

Suit instituted against the Municipal Council of Tanjore for the balance alleged to be due for work done by the father of the plaintiff in pursuance of a contract with the Municipal Council. The contract was signed by the contractor but was not signed by the Chairman or Vice-Chairman and one of the Councillors as required by section 45 of Act IV of 1884. No objection however was taken on this ground by the Council in the Court of First Instance or on appeal.

* Second Appeal No. 27 of 1904, presented against the decree of M.B.Ry. T. T. Rangachariar, Subordinate Judge of Kumbakonam, in Appeal Suit No. 1152 of 1902, presented against the decree of M.B.Ry. R. S. Ranganadha Mudaliar, District Munsif of Tanjore, in Original Suit No. 80 of 1901.

The District Munsif found that the work had been done and passed a decree in favour of the plaintiff. His decision was reversed on appeal and the suit was dismissed on the ground that it was barred by limitation. Plaintiff preferred this second appeal.

The Hon. Mr. P. S. Sivaswami Ayyar and T. Rangaramanujachariar for appellant.

T. V. Seshagiri Ayyar for V. Krishnaswami Ayyar for respondents.

JUDGMENT.—Exhibit B is the contract that it was proposed should be entered into between the Municipal Council and the contractor. It was signed by the contractor and was then forwarded to the Chairman by the Assistant Sanitary Engineer so that it might be signed by the Chairman or Vice-Chairman and one Councillor as required by section 45, Act IV of 1884 (Madras). The document was however not so signed. The contract being of the value of above Rs. 200 is not binding on the Council (*Radha Krishna Das v. The Municipal Board of Benares*(1)). Our attention has been drawn to the decision in *Abaji Sitaram v. Trimbak Municipality*(2), which however does not refer to or consider the authorities on which the Allahabad case proceeded. Under the decision in *Young & Co. v. The Mayor and Corporation of Royal Leamington Spa*(3) it is clear that the Municipality cannot be rendered liable on the ground of executed consideration. The decision in *Lawford v. The Billericay Rural Council*(4) is distinguishable from that at *Young & Co. v. The Mayor and Corporation of Royal Leamington Spa*(3) as the local body there dealt with was not governed by any statutory provision such as that to be found in the Public Health Act, 1875, section 174. On the ground that the contract is not binding on the Municipality, this second appeal must be dismissed, but as this contention was not advanced in either of the lower Courts, we consider that both parties should pay their own costs throughout. The decree of the lower Appellate Court will be modified accordingly.

(1) I.L.R., 27 All., 592.
(3) L.R., 8 A.C., 517.

(2) I.L.R., 28 Bom., 66.
(4) L.R., (1903), 1 K.B., 773.

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MUNICIPAL
COUNCIL,
TANJORE.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice.

1906,
March 16, 20. APPASAMI THEVAN AND OTHERS (PLAINTIFFS NOS. 1, 3, 5 AND 6),
APPELLANTS,

v.

VIRAPPA THEVAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act IV of 1882, s. 68 (b)—Holder of unregistered mortgage deprived of his security by subsequent registered sale to third party can sue under s. 68 (b) of the Transfer of Property Act—The section applies even when there is a covenant to pay—Notice of prior unregistered mortgage, effect of.

Where the owner of properties after having mortgaged them under an unregistered deed, sells them for valuable consideration by registered deed to one who has no notice of the mortgage, the mortgagee is deprived of his security by the wrongful act of his mortgagor and is entitled to sue the mortgagor for his money under section 68 (b) of the Transfer of Property Act. Such right exists independently of, and is not taken away by, any covenant to repay contained in the mortgage deed.

The purchaser under a registered sale-deed has no priority over a prior unregistered mortgage of which he has notice.

SUIT to recover the amount due under an unregistered mortgage deed executed by the father of defendants Nos. 1 to 4. The facts necessary for this report are fully set out in the judgment.

T. Natesa Ayyar for appellants.

K. Ramachandran for respondents.

JUDGMENT.—The plaintiffs sue on a mortgage dated November 18, 1890, executed by one Appasami Thevan, the father of defendants Nos. 1 to 4. The mortgage was unregistered. In 1895, Appasami Thevan sold the mortgage property by a registered sale-deed to one Kasi Thevan. Kasi Thevan's widow, as the guardian of Kasi Thevan's minor son, sold the property to the fifth defendant in January 1902 by a registered sale-deed. The fifth defendant, in his written statement, alleges that the sale by Appasami Thevan to Kasi Thevan and by Kasi Thevan's

* Second Appeal No. 1262 of 1904, presented against the decree of G. F. T. Power, Esq., District Judge of Tanjore, in Appeal Suit No. 1163 of 1903, presented against the decree of Muhammed Fuzluddin Sahib, District Munsif of Mannargudi, in Original Suit No. 223 of 1903.

widow to him were without notice of the mortgage to the plaintiffs. The mortgage to the plaintiffs contains a personal covenant to repay the mortgage money, and the plaintiffs claimed as against all the defendants payment of the mortgage money, and, in default, recovery of the amount by sale of the property. In the Court of First Instance, the defendants Nos. 1 to 4 did not appear. The plaintiff's pleader did not ask for a decree against the property but asked for a personal decree against defendants Nos. 1 to 4, the money to be realized from the assets of the deceased Appasami Thevan (the mortgagor) in their hands. A decree was given in those terms. Defendants Nos. 1 to 4 appealed. I had some doubt whether it was open to these defendants to appeal, since they allowed judgment to go against them by default in the Court of First Instance (see *Walker v. Budden*(1)).

The District Judge appears to have been of opinion that these defendants were entitled to appeal as the reason for their not appearing in the Court of First Instance was that the plaintiffs' case in that Court was that the mortgage money should be recovered by the sale of the property and they were not interested in opposing this claim, as the property had been sold to the fifth defendant. Why defendants Nos. 1 to 4 should have assumed that no claim was going to be made against them, having regard to the form of the prayer in the plaint, is not clear. The point that defendants Nos. 1 to 4 were not entitled to appeal was not taken before the lower Appellate Court or before this Court. Section 540 of the Code of Civil Procedure provides that an appeal may lie from an original decree passed *ex parte*. It is not necessary for me to decide, whether, in the events which happened, defendants Nos. 1 to 4 had a right of appeal. For the purposes of this judgment I assume that they had. The appeal was allowed by the lower Appellate Court on the ground that the plaintiffs' personal remedy against defendants Nos. 1 to 4 was time barred. So far as the personal covenant to repay is concerned the plaintiffs' remedy is clearly barred, but the question for determination is—Have the plaintiffs the right to recover the mortgage money from defendants Nos. 1 to 4 under the provisions of section 68 of the Transfer of Property Act, which gives a mortgagee a right to sue his mortgagor for the mortgage

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(1) L.R., 5 Q.B.D., 267.

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THEVAN.

money (a) when the mortgagor binds himself to repay it, (b) when the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor? If the fifth defendant had notice of the plaintiffs' mortgage, the sale to him would be subject to the incumbrance notwithstanding the fact that the mortgage was unregistered and the sale was registered (see *Krishnamma v. Suranna*(1)). Defendants Nos. 1 to 4, however, do not allege that either the fifth defendant or his vendor had notice of the incumbrance. The fifth defendant alleges that the sales to Kasi Thevan and by Kasi Thevan's widow to himself were for good consideration and without notice. There is no finding upon the question. If notice is relied on, it must be proved. In the absence of any evidence that the fifth defendant and his vendor took with notice, and having regard to the allegation in the fifth defendant's written statement that they took without notice, I am of opinion that I must deal with the case on the assumption that there was no notice. That being so, it seems to me clear that the mortgagee was deprived of his security by the wrongful act of the mortgagor and that he is entitled to sue the mortgagor for the mortgage money under section 68 of the Transfer of Property Act. It was not suggested that the plaintiffs' rights under paragraph (b) of the section were barred by limitation, and I certainly cannot accede to the argument that paragraph (b) of the section does not apply in cases where the mortgage deed contains a personal covenant to repay.

I allow this appeal and set aside the decree of the lower Appellate Court and restore that of the Munsif. The plaintiffs are entitled to their costs throughout.

(1) I.L.R., 16 Mad., 148.

APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice Sankaran Nair.

PATHA MUTHAMMAL AND OTHERS (DEFENDANTS NOS. 1, 2, 4 AND 9), APPELLANTS,

1906.
February 2.

v.

ESUP ROWTHER AND OTHERS (PLAINTIFFS NOS. 1 TO 7 AND DEFENDANTS NOS. 3, 5 TO 8 AND 10), RESPONDENTS.*

Registration, how far compromises in suits exempted from.

A razinamah does not require registration only in regard to such of its stipulations and provisions as are incorporated with and given effect to by the order of the Judge. The provisions of the Registration Act will apply to terms in the razinamah which are not so incorporated.

Pranal Anni v. Lakshmi Anni, (I.L.R., 22 Mad., 508), followed.

SUIT by the plaintiffs for possession of land. The elder sister of the first plaintiff brought a suit (Original Suit No. 43 of 1901) against the present plaintiffs and defendants Nos. 1 to 7 for partition of the plaint mentioned and other properties. A razinamah was entered into by which the plaintiff in that suit was to get certain specific immoveable properties for her share and each of the other sharers were to get specific and defined lands for their shares. The razinamah dealt with immoveable properties for above Rs. 100 in value and was not registered. The Court ordered it to be recorded but passed a decree only in respect of the then plaintiff's share and no decree was passed in respect of the shares allotted to the other sharers.

The present suit was instituted in respect of one of the shares not so included in the decree.

The defendants contended *inter alia* that the plaintiffs could not base their claim on the compromise as it was not registered.

The Munsif upheld the contention of the defendants and dismissed the suit. On appeal the Subordinate Judge held that the razinamah did not require registration under the ruling in

* Second Appeal No. 1083 of 1905, presented against the decree of M.R.Ry. V. Subramaniam, Subordinate Judge of Tanjore, in Appeal Suit No. 43 of 1905, presented against the decree of M.R.Ry. N. Sambasiva Ayyar, District Munsif of Pattukkottai, in Original Suit No. 37 of 1904.

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MUTHAMMAL
v.
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Pranal Anni v. Lakshmi Anni(1) and reversing the decree of the Munsif, he remanded the case for retrial.

Defendants preferred this second appeal.

T. T. Tiruvenkatachiar and *P. Subramaniam* for appellants.

A. S. Balasubrahmaniam Ayyar for first to seventh respondents.

JUDGMENT.—The plaintiffs are the defendants Nos. 1 to 7 in Original Suit No. 43 of 1901, and this suit is based on a razi-namah (exhibit A) presented to the District Munsif during the trial of that suit. The question that we have to decide is whether exhibit A required registration or not. The Subordinate Judge finds that registration was not necessary on the strength of the decision of the Privy Council in *Pranal Anni v. Lakshmi Anni*(1). As we, however, read that judgment it appears to us to lead to an opposite conclusion. The District Munsif, in Original Suit No. 43 of 1901, decided that certain items of land were to be handed over to the plaintiff in that suit, and he states that he did this in accordance with the terms of the razi-namah and inasmuch as his allotment to the plaintiff did not appear to be unfavourable to those of the parties to the suit who had not joined in the razi-namah. As regards all other matters set out in the razi-namah he gives no opinion, but simply records that document (section 275, Civil Procedure Code). The facts being as has been stated, it must be held that under the decision of the Privy Council already mentioned (exhibit A) required registration before it could be received as evidence in support of the case of the present plaintiff. What their Lordships there held was that the razi-namah then under their consideration did not require registration in so far as its stipulations and provisions were incorporated with and given effect to by the order of the Judge and they go on to observe as follows: "The razi-namah in so far as it was submitted to and was acted upon judicially by the learned Judge was in itself a step of judicial procedure not requiring registration." It therefore follows that in so far as the razi-namah was not submitted to and acted upon judicially by the Judge, it did require registration. In the present case there can be no question that the clause in the razi-namah setting out the items in schedule A which the present plaintiffs should get possession of was not submitted to and acted judicially upon by the District Munsif in the

(1) I.L.R., 22 Mad., 508.

suit of 1901. We may also point out with reference to the observations of their Lordships later on in the same judgment that in the present case it cannot be argued that in the order of the District Munsif the terms of the compromise in so far as the present plaintiffs are concerned were either referred to or narrated. We accordingly must hold that the razi-namah (exhibit A) in so far as it is relied on by the plaintiffs now is inadmissible as evidence for want of registration. We cannot accept the finding of the Subordinate Judge that the razi-namah only recited an oral agreement entered into between the parties. That is not the case set up by the plaintiffs and there is nothing in exhibit A to show that there was any prior oral agreement. We accordingly set aside the order of the Subordinate Judge and dismiss this suit. The parties will bear their own costs throughout.

PATHA
MUTHAMMAL
v.
ESUP
ROWTHER.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Subrahmaniam Ayyar.

REFERENCE UNDER COURT FEES ACT, 1870.*

Court Fees Act VII of 1870, s. 7 (e), cl. IX, and art. I of sched. I—Art. I of sched. I of the Act applies to appeals in mortgage suits—Court-fee payable on subject-matter in dispute in the appeal.

Section 7 (e), clause IX of the Court Fees Act, applies only to "suits" and not to appeals. In the case of appeals in mortgage suits article I of schedule I of the Act applies. The Court-fee in such cases is payable on the value of the subject-matter in dispute in the appeal and not of the subject-matter in dispute in the suit.

Nepal Bai v. Debi Prasad, (I.L.R., 27 All., 447), followed.

Umarkhan v. Mahomed Khan, (I.L.R., 10 Bom., 41), dissented from.

The facts necessary for this report are fully set out in the judgment.

T. Rangachariar and *V. Purushothama Ayyangar* for S.R. No. 12162 of 1905.

E. Venkatarama Sarma for S.R. No. 13337 of 1905.

* Stamp Reference No. 12162, etc., of 1905, under section 5 of Act VII of 1870, by A. L. Hannay, Esq., Registrar of the High Court, Madras.

REFERENCE
UNDER COURT
FEES ACT,
1870.

ORDER—Sir ARNOLD WHITE, C.J.—The plaintiffs sued for redemption. They valued their suit at Rs. 231-11-7, the amount they stated to be still due on the bond, but Court-fees amounting to Rs. 580 were levied from them with reference to section 7, clause IX, of the Court Fees Act, which makes fees leviable in suits against a mortgagee for the recovery of the property mortgaged, upon the principal money expressed to be secured by the mortgage in this case Rs. 13,500.

The plaintiffs got a decree for redemption upon payment of Rs. 231-11-7.

The defendants appealed and the original decree was modified by directing that the plaintiffs should pay Rs. 1,162-6-5 in addition to the amount fixed by the lower Court, Court-fees were only paid on Rs. 1,162-6-5.

The plaintiffs and the defendant now prefer separate second appeals. The plaintiffs (mortgagors) valuing their second appeal at Rs. 1,162-6-5, while the defendant (mortgagee) values his second appeal at Rs. 10,000.

The mortgagee says he is not liable to pay Court-fees on Rs. 13,500, the amount of the principal money secured by the mortgage, but only on the difference between the amount claimed by him, and the amount which, under the decree of the lower Appellate Court, he has been held to be entitled to receive.

The mortgagor says he is not liable to pay Court-fee on Rs. 13,500, but only on Rs. 1,162, the amount which, under the decree of the lower Appellate Court, he has been held liable to pay in addition to the Rs. 231-11-7 which, under the decree of the Court of First Instance, he was held liable to pay.

I will take the case of the mortgagor-appellant first. The question is—is the fee payable by him governed by section 7 (e), IX of the Court Fees Act, or is it governed by article 1 of the first schedule to the Act? If, by the former, the fee is to be computed with reference to Rs. 13,500, the principal money expressed to be secured by the instrument of mortgage. If, by the latter, the further question arises, do the words “subject-matter in dispute” in the second column of article 1 of the 1st schedule mean subject-matter originally in dispute in the suit, or subject-matter in dispute in the appeal. I am of opinion that article 1 of the 1st schedule applies and that the words “subject-matter in dispute” mean subject-matter in dispute in the appeal.

REFERENCE
UNDER COURT
FEES ACT,
1870.

I think it is clear that article 1 applies unless it can be said that the matter is otherwise provided for in the Act. Now turning to section 7, I find that in cases falling within sub-section (e), IV, there is a special provision that the method of computation for the purpose of a memorandum of appeal shall be “otherwise,” that is to say, it is to be according to the amount at which the relief sought is valued in the memorandum of appeal. There is no similar special provision with regard to cases falling within section 7 (e), IX. It seems to me that the word “suits” in this sub-section cannot be construed as including appeals and that appeals (unless otherwise provided for) are governed by article 1. The more natural construction of the words “subject-matter in dispute” seems to me to read them, when a memorandum of appeal is concerned, as applying to the matter in dispute in the appeal. Section 16 seems to show that the general policy of the legislature was to make the value of the subject-matter in dispute in appeal the criterion for the purpose of computing the fee.

In the case in “Reference under Court Fees Act” (1) the question for decision was—“In a suit to redeem a mortgage and to recover arrears of rent due by the mortgagee to the mortgagor on account of the mortgaged property should the Court-fee to be levied be calculated according to the *sum* of the principal amount of the mortgage and arrears of rent, or according to the difference of those two items?” It seems to me that that decision does not cover the point raised in the present cases. The precise point was considered by the Chief Justice of the Allahabad High Court in the case of *Nepal Rai v. Debi Prasad* (2) and he held that the fee was to be calculated with reference to the amount in dispute in the appeal. I agree with this decision. The case of *Pirbhu Narain Singh v. Sita Ram* (3) is a decision the other way. Sir John Edge based his decision on the ground that relief claimed by the mortgagor in appeal was a relief which it was impossible to value, but that it would be otherwise if a mortgagee appealed on the ground that a larger amount was due than that which had been awarded. So far as the construction of the Act is concerned I fail to see any good grounds for this distinction. I find myself unable to agree with the decision in the case of *Umarkhan v.*

(1) I.L.R., 14 Mad., 480.

(2) I.L.R., 27 All., 447.

(3) I.L.R., 13 All., 94.

REFERENCE
UNDER COURT
FEES ACT,
1870.

Mahomed Khan and others(1) which is in conflict with the recent decision of the Allahabad High Court.

As to the appeal by the defendant the mortgagee I agree that one rule should apply in both cases, but it seems to me that, as a question of construction of the Act, the right rule to apply is that laid down in the case in *Nepal Rai v. Debi Prasad*(2) which so far as an appellant mortgagee is concerned, is in accordance with the opinion expressed by Sir John Edge in the case in *Pirbhu Narain Singh v. Sita Ram*(3).

I think in the case of both appeals, the fee is to be calculated with reference to the value of the subject-matter in dispute in appeal.

S.R. No. 13337 of 1905.

For the reasons stated above, I think the fee is to be calculated with reference to the subject-matter in dispute in the appeal.

SUBBAHMANIA AYYAR, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Moore.

1906.
February 15.

PERIA MUTHIRIAN AND OTHERS (RESPONDENTS, PLAINTIFFS),
APPELLANTS,

v.

KARAPPANNA MUTHIRIAN AND ANOTHER (FIRST AND THIRD
DEFENDANTS, FIRST AND THIRD RESPONDENTS), RESPONDENTS.*

*Civil Procedure Code—Act XIV of 1882, s. 373—Court has power to extend
time for payment of costs.*

Where a party has been permitted to withdraw from a suit with liberty to bring a fresh suit if he should pay costs within a named date under section 373 of the Code of Civil Procedure, the Court has power to extend the time for payment when it is absolutely impossible for the party to pay such costs on or before the day so fixed.

(1) I.L.R., 10 Bom., 41 at p. 45.

(2) I.L.R., 27 All., 447.

(3) I.L.R., 13 All., 94.

* Appeal No. 74 of 1905 under section 15 of the Letters Patent presented against the order of Mr. Justice Boddam in Civil Revision Petition No. 34 of 1905.

The facts are sufficiently stated in the judgment of the learned Judge which is as follows:—

I think the order of the District Munsif cannot be supported. An order was made, on the 14th June 1904, giving the plaintiffs leave to withdraw their suit and bring a fresh suit if they paid certain costs within a date named, but, if they did not, the suit should stand dismissed.

The plaintiffs did not pay within the time named and by the order passed their suit stood dismissed.

More than a month afterwards the plaintiffs applied for an extension of time to pay the costs and the District Munsif held that they were entitled to a review and extended the time to seven days from the date of his order.

This order he had no jurisdiction to make. By the previous order the suit stood dismissed and the District Munsif had no power to review that order under section 623 of the Civil Procedure Code or to extend the time unless the order was varied or set aside. I, therefore, allow the Revision Petition and set aside his order with costs in this and in the lower Court.

S. Krishnamachariar for appellants.

The Hon. Sir V. C. Desikachariar for the Hon. Mr.

P. S. Sivaswami Ayyar for respondents.

JUDGMENT.—The order of the District Munsif was that costs were to be paid on or before the 24th June 1904. It was not however till the 11th July that the amount of the costs was ascertained and even then the amount was incorrect and it was not till the 29th July that the correct figures were given. Application for extension of time in which to pay was made on the 30th July. We must hold that the District Munsif exercised a sound discretion in extending the time for payment inasmuch as it was absolutely impossible for the plaintiffs to pay the amount of costs into Court on or before the date originally fixed, i.e., the 24th June. We allow this appeal, set aside the order of the learned Judge and restore that of the District Munsif with costs before Mr. Justice Boddam and in this Court.

PERIA
MUTHIRIAN
v.
KARAP-
PANNA
MUTHIRIAN.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice.

EMPEROR

v.

CHINNAPAYAN.*

1906.
February 7.*Criminal Procedure Code—Act V of 1898, ss. 243, 252—Trial of a warrant case as a summons case not a mere irregularity.*

Where a Magistrate in trying a warrant case does not adopt the course prescribed by section 252 of the Code of Criminal Procedure, but convicts the accused on his own admission without taking evidence and without framing a formal charge, such procedure is not a mere irregularity and the conviction will be set aside.

THE facts necessary for this report are fully set out in the letter of reference which is as follows:—

One Cinnapiam of Cuddalore New Town was charged by the Station House Officer, Pudupalaiyam town, for unlicensed manufacture and sale of opium under section 9 (b) and (f) of the Opium Act No. I of 1878. The Stationary Sub-Magistrate, Cuddalore, before whom the charge sheet was laid, did not record any evidence in support of the charge but asked the accused to plead to the charge, convicted him on his own plea and sentenced him on 18th October 1905 to suffer two months' simple imprisonment in Calendar Case No. 1402 of 1905 on his file. An offence under section 9 of the Opium Act is a warrant case, whereas the Sub-Magistrate tried it as a summons case. The accused appealed against his conviction to the Sub-Divisional Magistrate, Cuddalore Division, who while recognising that the Sub-Magistrate's procedure in trying the case as a summons case was irregular nevertheless held that the said irregularity had not occasioned a failure of justice. He accordingly confirmed the conviction and dismissed the appeal on 25th November 1905 in Criminal Appeal No. 24 of 1905 on his file. While the appellate judgment came up for perusal I noticed that the grounds of appeal had not been stated therein, and on calling for the records found

* Case Referred No. 4 of 1906 (Criminal Revision Case No. 17 of 1906) for the orders of the High Court under section 438 of the Code of Criminal Procedure by A. R. Cumming, Esq., District Magistrate of South Arcot, in his letter, dated 31st December 1905 (R.O.C. No. 2234 of 1905).
May

that the appellant had denied his plea of guilty in the lower Court. In view of the ruling in *Mohideen Abdul Kadir v. Emperor*(1) I consider that the conviction should be set aside and a retrial ordered.

The Public Prosecutor appeared in support of the reference.

ORDER.—There is no doubt that this case ought to have been tried as a warrant case and not as a summons case. If it had been tried as a warrant case, it would have been the duty of the Magistrate under section 252 of the Code of Criminal Procedure to take such evidence as might be produced in support of the prosecution; and the accused could not have been called upon to plead until after a charge had been framed and read and explained to him (section 255).

The Magistrate appears to have convicted the accused under section 243, on an admission made by the accused, without taking any evidence and without framing a formal charge. It seems to me this is something more than an irregularity, and that the accused may possibly have been prejudiced by the procedure adopted by the Magistrate.

The conviction must be set aside. As the accused has served his term of sentence, there is no object in ordering a new trial.

APPELLATE CRIMINAL.

Before Mr. Justice Subrahmanya Ayyar.

VYTHIANADA TAMBIRAN (PETITIONER), PETITIONER,

v.

MAYANDI CHETTY (COUNTER-PETITIONER), RESPONDENT.*

Criminal Procedure Code—Act V of 1898, s. 148 (3)—Award of costs may be made within a reasonable time after disposal of the main question.

An award of costs under section 148 (3) of the Code of Criminal Procedure should, in the usual course, be contemporaneous with the decision of the main question. Where, however, circumstances require the postponement of the award of costs, it should be made within a reasonable time after the disposal of the principal subject of the proceeding, in the presence of both parties.

(1) I.L.R., 27 Mad., 238.

* Criminal Revision Case No. 355 of 1905, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of C. G. Mackay, Esq., Head Assistant Magistrate of Chingleput, in Miscellaneous Case No. 33 of 1905.

EMPEROR
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January 31.

VYTHIANADA
TAMBIRAN
v.
MAYANDI
CHETTY.

IN Miscellaneous Case No. 33 of 1905, the Head Assistant Magistrate of Chingleput passed orders under section 145 of the Code of Criminal Procedure declaring the counter-petitioner to be in possession of the disputed lands. This order was passed on the 30th June 1905, and on the 3rd July 1905, the counter-petitioner applied for the award of his costs. The petitioner objected and the Magistrate, after hearing both parties, passed an order on the 7th July 1905 awarding costs to the counter-petitioner under section 148 of the Code of Criminal Procedure. Petitioner moved the High Court to revise the order under sections 435 and 439 of the Code of Criminal Procedure.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the petitioner.

P. R. Sundara Ayyar for respondent.

ORDER.—The facts of the case are these: The Magistrate passed the order under section 145 of the Criminal Procedure Code as to possession in favour of the counter-petitioner on the 30th June. On the 3rd July the counter-petitioner applied for costs. The petitioner accepted notice and objected to any order being passed in the matter. On the 7th idem the Magistrate passed the order now sought to be revised directing the petitioner to pay Rs. 250 as costs to the counter-petitioner. Mr. Ramachandra Ayyar contends that the order was passed without jurisdiction as it was not passed at the time the matter of possession was decided. I cannot accept the construction suggested by Mr. Ramachandra Ayyar that section 148 (3) which empowers a Magistrate to award costs in proceedings under chapter XII of the Code of Criminal Procedure permits him in a case like this to award costs only simultaneously with the decision as to possession. The word 'passing' which follows the term 'Magistrate' in the said provision, as I understand it, means no more than that the Magistrate who may award costs, is the officer holding the proceeding under the chapter or his successor entitled to discharge his functions in connection with the matter. Even if this would be going too far, and the right construction were that the award of costs should be made by the same Magistrate that deals with the main question in the proceeding, the order here cannot be held to be void or illegal in as such in fact was the case here. The view as to the section thus taken by me is not only not opposed to the cases of

Queen-Empress v. Tomijuddi(1), *Giridhar Chatterjee v. Eradullah Naskar*(2), and *Binoda Sundari Chowdhurani v. Kali Kristo Pal Chowdhary*(3), to which my attention has been drawn but is more or less supported by them. It is scarcely necessary to add that though I hold the circumstance that the award of costs is not made at the very time the substantial question in the proceeding is disposed of, does not necessarily render the award invalid, I should not be understood as implying that the length of the interval is immaterial. In the usual course the award should almost invariably be contemporaneous with the decision as to the main question. A different course should be pursued only when the circumstances of the case really require the postponement of the disposal of the question of costs and no order in the matter should be passed except within a reasonable time after the disposal of the principal subject of the proceeding and in the presence of both the parties. Upon the facts of this case no objection on the score of long delay exists and in the view of the section I take, it is not open to me to go into the question as to whether the amount awarded is proper. I dismiss the petition.

VYTHIANADA
TAMBIRAN
v.
MAYANDI
CHETTY.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice.

IN THE MATTER OF KUPPAMMALL (COMPLAINANT), PETITIONER.*

1906.
May 16.

Criminal Procedure Code—Act V of 1898, ss. 517-523 Sections not applicable where there was no trial and no evidence recorded.

When a person charged before the Magistrate with criminal breach of trust in respect of certain jewels died before trial and before any evidence was recorded and the alleged owner of the jewels, which were recovered by the Police from the pledgees and sent to the Magistrate along with the charge sheet, applied to be put in possession of them under sections 517 and 523 of the Code of Criminal Procedure after enquiry as to their ownership:

Held, that section 517 of the Code of Criminal Procedure did not apply to the case.

Held further, that as there was no evidence or finding about ownership, section 523 of the Code of Criminal Procedure did not apply and that the

(1) I.L.R., 24 Calo., 757.

(2) I.L.R., 22 Calo., 385.

(3) I.L.R., 22 Calo., 387.

* Criminal Revision Case No. 239 of 1906, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of F. D. Bird, Esq., Presidency Magistrate, Georgetown, in Calendar Case No. 11317 of 1906, dated 2nd May 1906.

IN THE
MATTER OF
KUPPAMMALL.

Magistrate was not bound to hold an inquiry simply to determine the ownership of the jewels.

THE facts necessary for this report are fully set out in the order of the Magistrate which is as follows:—

ORDER.—On the 9th April 1906 three charge sheets were put in by the Police of the C Division against one Munee Bai *alias* Munee Rao under section 406, Indian Penal Code, charging him with criminal breach of trust in respect of certain jewels borrowed by him from different persons and recovered by the Police, as the result of a complaint made by one of the persons concerned, from parties with whom they had been pledged. The jewels were sent to this Court with the charge sheets. As the accused was certified by the Medical officer of the Penitentiary to be too unwell to attend Court on the 9th, the cases were adjourned to the 19th idem and the accused remanded to that date. He died in the Penitentiary on the 13th April 1906. The matter now engaging the attention of the Court is the disposal of the property connected with the charge sheets. The case is a peculiar one and enquiries in the Magistrate's Courts in Madras have failed to produce a precedent. The alleged owners of the property, who say that the deceased accused borrowed it from them, pray for an order for its restoration to them, while the persons, with whom the accused pledged the property are equally desirous that it should be returned to the possession from which it was recovered by the Police.

2. Chapter XLIII, Criminal Procedure Code, contains the law for the guidance of Magistrates in the disposal of property. The only two sections that need be considered now are 517 and 523. The former empowers a Court *on the conclusion of an enquiry or a trial* to make such order as it thinks fit for the disposal of any property brought before it in any way in connection with the subject of such enquiry or trial. It has been ruled in Bombay High Court Criminal Ruling No. 10, dated 16th March 1898, that an order under section 517 *cannot be made before the conclusion of the trial*. The object is to ensure that the Magistrate shall be in possession of all the facts of the case before disposing of the property.

3. In the case *In re Devidin Durgaprasad*(1) it is laid down that section 517 is the only section under which a Court can

(1) I.L.R., 22 Bom., 844.

IN THE
MATTER OF
KUPPAMMALL.

make an order for the disposal of property produced before it in the course of an enquiry or trial and if the Court finds that the matter does not come within section 517, the only legal order that can be passed is to restore the previous possession.

4. In this case, although the preliminary steps for a trial were taken, it cannot be said that the trial has been *concluded*, the real value of that word in that connection is "to make a final judgment or determination of." It is more correct to say that the trial has *abated*, that is, it has failed. I therefore hold that section 517, Criminal Procedure Code, does not apply to this matter.

5. The other section relating to the disposal of property by a Magistrate is section 523, Criminal Procedure Code. That gives a Magistrate power to make an order for the disposal of property seized by the Police under section 51, Criminal Procedure Code, or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence. Reading sections 517 and 523 together, it seems that when once property is sent on to a Magistrate with a charge sheet it is removed from the provisions of section 523 and we have already seen that the Magistrate must then act under section 517. This view is confirmed by the ruling *In re Ratanlal Rangildas*(1) "the scope of section 523 must be confined to property seized by the Police of their own motion in the exercise of the powers conferred on them by law, for instance, under sections 51, 54, 164 or 165, Criminal Procedure Code." We may therefore take it that section 523 does not apply to this case and it has already been held that section 517 does not. This being so, the remark *In re Ratanlal Rangildas*(1) must be borne in mind. "These cases being, as I have pointed out, not of the classes contemplated by sections 523 and 517 and there being, therefore, no provision of the law authorising the Magistrate to depart from the general rule that property taken under the authority of the law for a particular purpose should, on the fulfilment of that purpose, go back to the custody whence it was taken"

6. The particular purpose for which the Police seized this property was to secure the punishment of the person who had committed an offence in connection with it and not in order that it should be restored to its owner.

(1) I.L.R., 17 Bom., 748 at p. 755.

IN THE
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7. The principal function of a Criminal Court is to punish offenders. It has other duties of secondary importance to perform. One of them is to pass orders as to the disposal of property produced before it in connection with a trial. It does not appear that it is authorised to usurp the functions of a Civil Court and convert the trial of an accused person into an enquiry in regard to property.

8. I have heard Mr. S. Guruswami Chetti on behalf of one of the "owners" and I have considered carefully his contentions but they do not induce me to depart from the conclusions recorded above. It is true that both sections 517 and 523 have been enlarged since the date of the Bombay rulings quoted, but I do not find that the amendments render in any way inoperative the application of those rulings to the sections as they now stand.

9. In the result I hold that there is no authority for this Court to enter into a long and contested enquiry to enable it to arrive at a decision as to how the property before the Court should be disposed of. I therefore direct that the various articles of jewellery and the note-books produced by the Police in connection with the three charge sheets referred to, be returned to the parties from whose possession respectively they were taken, subject to a written undertaking by each person so receiving any article or articles to produce the particular and identical article or articles received by him before the Civil Court when called upon to do so; and I also direct that this order shall not take effect for one month from this date to enable the alleged owners of the property to apply to the High Court for the revision of this order and for the issue of such further orders as may be just under section 520, Criminal Procedure Code, should they wish to do so.

S. Guruswami Chetti for the petitioner.

ORDER.—I think the Magistrate was right. It was conceded by the vakil for the petitioner that the provisions of section 517, Criminal Procedure Code, did not apply. His contention was that he was entitled to an order under section 523. It seems to me that on the facts of the present case, section 523 has no application. There is no finding, and there is nothing to show, that the property in question belongs to the petitioner. As I read the section, there is no obligation on the Magistrate to hold an enquiry simply for the purpose of deciding whether the property claimed is the property of the petitioner.

The criminal revision case and the criminal miscellaneous petition are dismissed.

PRIVY COUNCIL.

VASUDEVA MODELAR AND OTHERS, DEFENDANTS,

P.O.*
1906.
May 17.

SHADAGOPA MODELAR, PLAINTIFF.

[On appeal from the High Court of Judicature
at Madras.]

Appeal to Privy Council—Stay of execution of decrees pending appeal—To what Court application should be made—Power of High Court to grant stay of execution up to determination of Privy Council appeal—Order of Judicial Committee granting stay of execution where High Court had not done so.

Application for stay of execution of a decree pending an appeal to His Majesty in Council should always be made, in the first instance at any rate, to the Court in India which has ample power to deal with the matter according to the circumstances of the particular case, and has knowledge of details which the Judicial Committee cannot possess on an interlocutory application.

In this case the High Court were of opinion that they had no power to grant a stay of execution up to the determination of the appeal by the Privy Council, but their judgment showed that they thought it ought to be granted; and the Judicial Committee allowed such a stay of execution upon terms.

THIS was a petition for stay of execution under the following circumstances:—

On 23rd September 1883 the petitioners Vasudeva Modelar and Iyyappa Modelar executed a bond in favour of one Krishna Modelar Avergal in consideration of a debt to him of Rs. 8,000, and charged certain immoveable property as security for the repayment of the said sum with interest, such repayment to be made by instalments of Rs. 1,000 per annum, and the first payment to be made on 23rd September 1884. Krishna Modelar Avergal entered into the transaction as managing member of a joint Hindu family of which the plaintiff was a member; and in a suit for partition of the estate of the joint family a Receiver Sreenivasa Pillay was appointed who, on 23rd September 1899, brought a suit in the Court of the Subordinate Judge of Napatam to recover the principal and interest due on the bond. In that suit the petitioners raised the defence of limitation, and the

* Present:—THE EARL OF HALSBURY, LORD MACNAGHTEN, SIR ARTHUR WILSON and SIR ALFRED WILLS.

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MODELIAH.

Subordinate Judge on 17th February 1902 held that the suit was barred so far as the first three instalments were concerned, but not barred so far as it related to the recovery of the last five instalments. He gave the plaintiff simple interest at 9 per cent. per annum, and made a decree against the petitioners for Rs. 10,605-12-6 by sale of the mortgaged property. On appeal the High Court on 13th March 1905 held that article 147 of schedule II of Act XV of 1877 governed the suit which was consequently not barred; and they allowed the plaintiff compound interest at $10\frac{1}{2}$ per cent. per annum and gave him a decree for sale of the mortgaged property as default in payment of Rs. 46,341-12-0 on or before 13th August 1905.

From that decree the defendants applied to the High Court for leave to appeal which was granted on 19th January 1906. The plaintiff however applied to execute his decree by sale of the mortgaged property whereupon on 30th January the petitioners made an application to the High Court for stay of execution pending the decision of the appeal. They alleged that the value of the property was Rs. 70,000 (the plaintiff alleged it to be Rs. 35,000); that under the circumstances it would be sold at a great sacrifice and involve the petitioners in heavy loss and trouble; and that the plaintiff could not be prejudiced by a stay of execution.

On 23rd February 1906 the High Court made an order on the application "that execution be stayed for three months from this date so as to give the defendants an opportunity to apply to the Privy Council for stay of execution."

In their petition the petitioners submitted that the order of the High Court was not a refusal to stay execution; that a stay of execution was under the circumstances of the case reasonable and proper; and that the High Court appeared to consider that an order for stay of execution ought to be made by His Majesty in Council and not by the High Court. On the termination of the suit for partition above referred to the debt in suit fell to the share of the respondent who was accordingly put on the record in place of the Receiver.

L. DeGruyther for the appellant in support of the petition referred to *Chatrapat Singh Durga v. Dwarkanath Ghose*(1).

(1) L.R., 21 I.A., 170; I.L.R., 23 Cal., 1.

Kenworthy Brown for the respondent.

1906, May 17th.—The judgment of their Lordships was delivered by Lord MACNAGHTEN.

JUDGMENT.—Their Lordships desire to repeat what has been often stated by this Board before, namely, that applications of this sort ought always to be made, in the first instance at any rate, to the Court in India, which has ample power to deal with the matter according to the circumstances of the particular case, and has knowledge of details which this Board cannot possess on an interlocutory application. In the present case their Lordships know no more than what is brought before them by affidavits not altogether satisfactory. There is, however, an indication in the judgment of the High Court showing that in their opinion an extension of the stay of proceedings ought to be granted. Acting upon that suggestion their Lordships will humbly advise His Majesty to grant a stay of proceedings on the appellants giving an undertaking by their Counsel to lodge the Petition of Appeal and their case within a fortnight from the time the Record arrives in England, and also at the same time to give the respondent leave to apply to the High Court at Madras either for the appointment of a Receiver, or for payment of a reasonable amount into Court, or any other relief which he may be advised to apply for. The appellants must pay the costs of this application in any event.

Application granted.

Solicitor for the appellants—*Douglas Grant.*

Solicitors for the respondents—*Lawford, Waterhouse & Lawford.*

VASUDEVA
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MODELIAH.

PRIVY COUNCIL.

SURYANARAYANA AND OTHERS, PLAINTIFFS,

v.

VENKATARAMANA AND ANOTHER, DEFENDANTS.

[On appeal from the High Court of Judicature
at Madras.]

Hindu Law—Adoption—Authority of husband to his wife to adopt—Death of first adopted son—Second adoption, validity of—Consent of sapindas to adoption—Intention of husband as expressed in authority to adopt.

A husband verbally authorized his wife to adopt a son. The authority was in general terms requiring her to adopt so as to continue his line and to provide for his spiritual benefit; no particular person being indicated for adoption and no restriction placed on his wife's discretion. He died in 1861 and after his death the widow in 1885 adopted a son who died shortly afterwards. In 1898 she adopted another son with the consent of some of the sapindas:

Held, that the second adoption was valid, the authority to adopt not being exhausted by the first adoption.

Gournath Chowdhree v. Arnoporna Chowdrain, (1852), 8 S.D.A. (Beng.), 332, dissented from.

Ram Soondur Singh v. Surbanee Dossee, 22 W.R., 121, approved.

In such a case the intention of the husband is to be mainly considered. Any special instructions which he may give for the guidance of his widow must be strictly followed: where no such instructions have been given, but a general intention has been expressed to be represented by a son, effect should, if possible, be given to that intention.

APPEAL from a judgment and decree (March 13th, 1903) of the High Court at Madras, which affirmed a decree (September 22nd, 1900) of the Court of the District Judge of Ganjam, and dismissed the appellants' suit.

The suit was brought for a declaration of the invalidity of the adoption by the second respondent, Venkataratnama, of the first respondent as a son to her husband one Venkata Narasu, who died on 8th February 1861. The adoption which it was sought to set aside was made on 10th June 1898 and purported to be made with the authority of the husband. By virtue of the same authority a former adoption had been made by Venkataratnama in May 1885,

* *Present*:—Lord MACNAGHTEN, Sir ANDREW SCOBLE, Sir ARTHUR WILSON, and Sir ALFRED WILLS.

but the son then adopted died in February 1886, being then only about two years old.

The main questions in this appeal were (a) whether the power to adopt was exhausted by the first adoption, and the second adoption was consequently illegal; and (b) whether if it was so exhausted the consent of some of the husband's sapindas validated the second adoption.

Both Courts in India decided in favour of the defendants. The facts were not in dispute, and will be found sufficiently stated in the report of the case in the High Court in *Suryanarayana v. Venkataratnama* (1) on this appeal.

L. De Gruyther for the appellant contended that the adoption was invalid, first, because Venkata Narasu gave no sufficient authority for such an adoption, and secondly because the authority of the sapindas did not validate the adoption. A general authority to adopt a son did not validate the adoption. A general authority to adopt a son did not authorize a second adoption in the case of the first adopted son dying. An authority to adopt must be strictly followed. A second adoption had no religious motives, for, the salvation of the ancestor, which was the object of adoption was obtained on the adoption of the first son even if he died shortly afterwards as in the present case. Reference was made to *Collector of Madura v. Moottoo Ramalinga Sathupathy* (2); *Mutasaddi Lal v. Kundan Lal* (3); *Amrito Lal Dutt v. Surnomoye Dasi* (4); *Surendro Keshub Roy v. Doorgasoodery Dossee* (5); *Chowdry Pudum Singh v. Koer Oodey Singh* (6); *Teeloke Chunder Rae v. Gyan Chunder Rae* (7); *Gournath Chowdhree v. Arnoporna Chowdrain* (8); *Mohendrololl Mookerjee v. Rookiney Dabee* (9); *Purmanund Bhattacharji v. Oomakunt Lahoree* (10); *Amirthayyan v. Ketharamayyan* (11); *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma and Radha Mohan v. Hardai Bibi* (12); *Collector of Madura v. Moottoo Ramalinga Sathupathy* (2); 1 Strange's 'Hindu Law,'

(1) I.L.R., 26 Mad., 681.

(2) 12 M.I.A., 397 at pp. 433, 441, 443.

(3) L.R., 33 I.A., 55; I.L.R., 28 All., 377.

(4) L.R., 27 I.A., 128; I.L.R., 27 Cal., 996.

(5) L.R., 19 I.A., 108 at p. 122; I.L.R., 19 Cal., 513 at p. 525.

(6) 12 M.I.A., 350 at p. 356. (7) (1847), S.D.A. (Beng.), 554.

(8) (1852), 8 S.D.A. (Beng.), 332. (9) (1864), 1 Coryton, 43 at p. 45.

(10) (1828), 4 Sel. Rep., 318. (11) I.L.R., 14 Mad., 65 at p. 66.

(12) L.R., 26 I.A., 113 at p. 142; I.L.R., 22 Mad., 398 at p. 421; I.L.R., 21 All., 460 at p. 486.

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78, 79; Mayne's 'Hindu Law,' 6th edition, page 141, paragraph 114 and page 143; *Lakshmibai v. Rajaji*(1); *Sham Chunder v. Narayni Dibeh*(2); *Narayanasami v. Kuppusami*(3); *Ramaswami Aiyar v. Venkataramayyan*(4); *Sreemutty Dossee v. Tarrachurn Coondoo*(5); and *Parasara Bhattar v. Rangaraja Bhattar*(6).

As to the authority given by the sapindas it was contended that it was not sufficient. It was only given by a very small number of the sapindas and those not the nearest reversioners: it did not show that any discretion had been exercised in giving permission to adopt; it was in terms too general; and it was not acted on within a reasonable time after it was obtained. Reference was made to West and Buhler's 'Hindu Law,' 967: *Collector of Madura v. Moottoo Ramalinga Sathupathy*(7); *Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo*(8); Institutes of Men, Chapter V, section 148: *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi*(9); and *Ganesa Ratnamaiyar v. Gopala Ratnamaiyar*(10).

W. C. Bonnerjee for the respondent contended that the authority given by Venkata Narasu was effectual to allow a second adoption; and that the adoption made with the consent of the sapindas was valid. The decision of either of these points in the respondent's favour was sufficient to enable him to succeed. Each case had to be decided on its own circumstances; no case authority was needed: the decision should be made on the construction of the authority to adopt given by Venkata Narasu. On the words of that authority there was nothing to confine the permission to the adoption of only one son; if the first one adopted died the adoption of another was permitted. The first adoption, in other words, did not exhaust the authority to adopt. [*Sir A. Scoble* referred to *Gournath Chowdree v. Arnopoorina Chowdrain*(11).] In that case the direction was to adopt a particular son. Reference was made to

(1) I.L.R., 22 Bom., 996.

(2) (1807), 1 S.D.A. (Beng.), 209; 1 Morley's Digest, p. 14, note 3.

(3) I.L.R., 11 Mad., 43.

(4) L.R., 6 I.A., 196 at p. 202; I.L.R., 2 Mad., 91 at p. 96.

(5) (1865), Bourke's Rep. A.O.C., 48 at p. 55.

(6) I.L.R., 2 Mad., 202 at pp. 203, 205.

(7) 12 M.I.A., 397 at pp. 433, 441, 443.

(8) L.R., 3 I.A., 154 at pp. 188, 193; I.L.R., 1 Mad., 69 at pp. 78, 83.

(9) L.R., 4 I.A., 1; I.L.R., 1 Mad., 174.

(10) L.R., 7 I.A., 173 at p. 177; I.L.R., 2 Mad., 270 at p. 279.

(11) (1852), 8 S.D.A. (Beng.), 332 at p. 334.

the Synopsis in Stoke's 'Hindu Law Books,' 663: *Surendra Nandan v. Sailaja Kant Das Mahapatra*(1); and Golap Chunder Sorkar's 'Tagore Law Lectures' for 1888, p. 234: *Collector of Madura v. Moottoo Ramalinga Sathupathy*(2) and *Lakshmibai v. Rajaji*(3); that was a case from the province of Satara where the Mitakshara and not the Mayukha law prevailed. There was no law that only the immediate reversioners should give their consent to the adoption.

L. DeGruyther replied referring to Macnaghten's 'Considerations of Hindu Law,' 175, 199; and 'Dattaka Mimamsa,' section 1, paragraphs 15 and 19, page 534, of Stoke's 'Hindu Law Books.' 1906, June 21st.—The judgment of their Lordships was delivered by

Sir ANDREW SCOBLE.—In this case there is no dispute about the facts, but two questions of law arise, both of which are of considerable importance.

Venkata Narasu, a Brahmin landholder in the district of Ganjam in the Madras Presidency, died intestate and without issue on the 6th of February 1861, leaving the second respondent, Venkata Ratnamma, his widow and sole heiress, him surviving. Before his death he verbally authorized his wife to adopt to him, and it is found by the learned Judges of the High Court that the authority was "in general terms, requiring her to adopt so as to continue his line, and to provide for his spiritual benefit. He did not indicate any particular person for adoption, either by name or otherwise, and placed no restrictions whatever on his wife's discretion."

Twenty-four years after her husband's death, on the 1st May 1885, the widow adopted a son of one of her sisters, but this child died in February 1886, and twelve years later, on the 10th June 1898, she adopted the first respondent. Prior to making this second adoption she obtained the consent of the elder representatives of two branches of her husband's family. The representatives of two other branches refused their consent, and on the 7th October 1899 brought the present suit to set aside the second adoption, as having been neither authorized by her husband nor made with the consent of his sapindas.

(1) I.L.R., 18 Calc., 385 at p. 392.

(2) 12 M.I.A., 397 at pp. 433, 441, 443.

(3) I.L.R., 22 Bom., 996.

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Upon these facts, the first question which their Lordships have to determine is whether the authority to adopt given by the husband was exhausted by the first adoption; or whether, on the death of the son first adopted, the authority of the husband survived so as to empower the widow to make a second adoption.

So far as their Lordships have been informed, there is no decisive text of the ancient Hindu lawgivers upon this point. The earlier English authorities express conflicting views. Sir F. Macnaghten, writing in 1824, at page 175 of his 'Considerations on the Hindu Law,' says:—

"If a woman be empowered by her husband to adopt a son, and if she does adopt one accordingly, it has never, I believe, been declared by any writer that this power can go beyond the adoption of one, or, without special authority from the husband, be extended to the adoption of another if the first adopted should die."

Sir William Macnaghten, writing in 1829, is less positive—

"It is a disputed point," he says, "whether a widow having, with the sanction of her husband, adopted one son, and such son dying, she is at liberty to adopt another without having received conditional permission to that effect from her husband. According to the doctrine of the Dattaka Mimamsa, the act would clearly be illegal; but Jagannatha holds that the second adoption in such case would be valid, the object of the first having been defeated." (Hindu Law, i. 86.)

Sir Thomas Strange, writing in 1830 as to the law prevalent in Madras, says:—

"There exists nothing to prevent two successive adoptions, the first having failed, whether effected by a man himself, or by his widow or widows after his death, duly authorized." (Hindu Law, i. 78.)

There are not many reported cases on the point. In Morley's 'Digest' (i. 14) published in 1850, there is a note to the effect that "instances have occurred in which a widow has made a second adoption on the failure of the first by death, in fulfilment of a single injunction or authority from her husband, the object of such injunction being unattained unless the child live."

The case of *Gournath Chowdhree v. Arnoporna Chowdrain*(1) is a distinct authority that where a widow is directed to adopt a son, she cannot adopt a second if the first adopted son dies. This case was decided by the Bengal Sudder Court in 1852, and is cited in

(1) (1852), 8 S.D.A. (Beng.), 332.

modern text-books as establishing the proposition. The issue to be determined in the case is thus stated in the report:—

"There being no permission in the *unoomuttee puttur*" (or deed of adoption) "to adopt (children) one after another, is it proper, according to the shaster, to adopt one (child) after the death of another?"

The *byawasta* of the pundit to whom this question was submitted by the Court, was:—

"The deed put in does not restrict the adoption to one son only, and therefore, on the death of the previous adopted son, another may be adopted."

In their judgment, the learned Judges first cite the passage from Sir William Macnaghten quoted above, omitting the last sentence relating to Jagannatha's opinion, and go on to say:—

"As it is a principle of Hindu law that, without permission, no son can be adopted, it is a fair legal inference that a second adoption on the death of the first child, when the husband is no longer alive to grant permission to adopt, cannot be valid."

Their Lordships are unable to attach much weight to this decision. It discards the opinion of the pundit, refers to no previous decisions, does not attempt to discuss the conflicting views of the vernacular authorities cited by Macnaghten, and rests upon an inference which begs the whole question. Whether, and how far, this case is still followed in Bengal, it is not necessary now to enquire. For the purposes of this appeal, it is enough to say that it is not a binding authority in Madras.

The learned Judges of the High Court, one of whom is a Hindu lawyer of great distinction, in their judgment say:—

"The cases in Calcutta to which our attention has been drawn adopt what appears to us to be too artificial a rule of construction in that they practically disregard the question of intention; and they hold that—

"when the general intention of a Hindu to be represented by an adopted son is clear, as in this case, there seems no reason why effect should not be given to such intention, if it is possible to do so without contravening the law."

The practice of the community, they add, has been in accordance with this view. As regards this particular case, they say:—

"The object and purpose of the authority given by the husband was to perpetuate his family as well as to secure his spiritual benefit, and it would be unreasonable to hold that an accident such as the early death of the boy first adopted should be allowed to frustrate the

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fulfilment of his object, and to preclude the widow from making another adoption in the absence of any legal impediment to her doing so."

Their Lordships agree with the learned Judges of the High Court in the opinion that the main factor for consideration in these cases is the intention of the husband. Any special instructions which he may give for the guidance of his widow must be strictly followed; where no such instructions have been given, but a general intention has been expressed to be represented by a son, their Lordships are of opinion that effect should, if possible, be given to that intention. This more liberal rule has been followed by the High Court of Bombay, as well as in Madras, and is not without support in Bengal. In a comparatively recent case (*Surendra Nandan v. Sailaja Kant Das Mahapatra*(1)) the learned Judges of the High Court at Calcutta say, at page 392:—

"Looking at the religious efficacy that ensues from the adoption of a son by a widow to her deceased husband, we think the Court should not be too astute to defeat an adoption, but should rather do its utmost to support it unless such adoption is clearly in excess or in breach of the power to make it."

The limitations to the application of the rule are indicated in the judgment of this Committee in *Collector of Madura v. Mootoo Ramalinga Sathupathy*(2), in which their Lordships say:—

"Inasmuch as the authorities in favour of the widow's power to adopt with the assent of her husband's kinsmen proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family which afford no plea for a supersession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites."

In the present case it is abundantly clear that the husband desired to be represented by a son after his death, and that he placed no specific limitation on the power to adopt, which he entrusted to his widow. His object was twofold—to secure spiritual benefit to himself, and to continue his line. Both these objects

(1) I.L.R., 18 Cal., 385.

(2) 12 M.I.A., 397 at p. 443.

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are meritorious in the view of the Hindu law, and both are in consonance with the feelings known to prevail throughout the Hindu community. In the absence of a natural son, both can be attained only by adoption. Funeral rites may be performed, and certain spiritual advantages secured, to the deceased by a near male relative; but it is stated in the 'Dattaka Chandrika,' a work of some authority in Southern India (sec. 1, pl. 22), that—

"Although by reason of the nephew's possessing the representation of the filial relation, he may be the means of procuring exemption from exclusion from heaven, and so forth; still, as the celebration of name and the due perpetuation of lineage would not be attained, for the sake of the same, the constituting him (an adopted son) is indispensable."

In his able argument on behalf of the appellants, Mr. DeGruyther contended that, by the adoption of the first adopted son, all the spiritual benefit to be derived from the act was secured to the deceased, and that the adoption of a second boy was, therefore, supererogatory and could not be held to be justified by the husband's sanction. This contention is disposed of by the judgment of Mr. Justice Romesh Chunder Mitter in the case of *Ram Soondur Singh v. Surbanee Dossee*(1), in which a similar argument was put forward:—

"Is there anything," says that learned Judge, "in the general Hindu law in support of the contention . . . ? No passage from any of the treatises on the Hindu law, and no texts of the Hindu shaster have been cited. As far as I am aware there is none in its support. On the other hand, the broad proposition for which the learned Counsel contends will in a great many cases defeat the essential object for which every Hindu desires to adopt, viz., the continuance of the spiritual benefit to be conferred upon him after his death. An adopted son attaining an age of sufficient maturity and by performing the religious services enjoined by the shasters, cannot exhaust the whole of the spiritual benefit which a son is capable of conferring upon the soul of his deceased father; because these services are enjoined to be repeated at certain stated intervals, and the performance of them on each successive occasion secures fresh spiritual benefit to the soul of the deceased father . . . I am, therefore, of opinion that the contention . . . is opposed to the general principles of the Hindu law."

(1) 22 W.R., 121.

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These observations apply with the greater force to the present case, as the boy first adopted died when little more than two years of age.

For the reasons stated, their Lordships agree with the High Court that the adoption of a second boy in this case was valid, and that the widow's authority to adopt was not exhausted by the first adoption. In the view which they take of the case it is not necessary for their Lordships to consider the second question raised upon this appeal, viz., whether, if the widow's authority had been held to have been exhausted, there was sufficient consent on the part of the husband's sapindas to validate the second adoption.

Their Lordships will humbly advise His Majesty that the decree of the High Court of Madras ought to be confirmed and the appeal dismissed. The appellants must pay the respondents' costs of the appeal.

Appeal dismissed.

Solicitors for the appellants—*Sanderson, Adkin, Lee & Eddis.*
Solicitor for the respondents—*Douglas Grant.*

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, and Mr. Justice S. Subrahmania Ayyar, Mr. Justice Davies, Mr. Justice Benson and Mr. Justice Moore.

• CHIRUVOLU PUNNAMMA (SECOND DEFENDANT), APPELLANT,

• CHIRUVOLU PERRAZU AND ANOTHER (PLAINTIFF AND FIRST DEFENDANT), RESPONDENTS.*

1905.
July
14, 17, 18,
27.
November
7, 8.
1906.
February 23.

Hindu Law—Reversioner, suit by to set aside adoption—Reversioner in such suit represents all interested in the reversion, but does not in suits questioning alienations—Alienation by limited owner gives rise to only one cause of action.

Although in suits relating to alienations by a qualified owner, the presumptive reversioner cannot, on the current of authority, be held to represent remote

* Second Appeal No. 540 of 1903, presented against the decree of M.R.By. I. L. Narayana Rao, Subordinate Judge of Kistna, in Appeal Suit No. 346 of 1902, presented against the decree of M.R.By. S. Ramasami Ayyar, District Munsif of Masulipatam, in Original Suit No. 583 of 1898.

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reversioners, yet in suits to set aside an adoption, the presumptive reversioner ought on principle to be held to represent the remote reversioner, provided the matter is decided after a fair trial; and this principle will apply equally when a remote reversioner is allowed to sue under special circumstances to set aside an adoption. An unauthorised alienation by a qualified owner gives rise to a cause of action for a declaratory suit from the date of alienation to all reversioners. In such cases there is only one cause of action to be sued upon.

The true purpose of the concession of a right of suit in these cases is the protection of the interest of the person or persons who may eventually turn out to be the heir or heirs, and the object of the legal proceeding is really the perpetuation of testimony which, owing to lapse of time, might not be available for the heir when the succession actually opens. The reversioner actually suing does not only do so for himself but also on behalf of all the rest.

Rani Anund Koer v. The Court of Wards, (L.R., 8 I.A., 14 at p. 22), referred to.

Brojo Kishores v. Sreenath Bose, (9 W.R., 463 at p. 465), referred to.

Suits involving questions as to adoptions stand on quite different grounds from those impeaching the validity of alienations.

The grave and important nature of disputes relating to adoptions makes it desirable that the adjudication in such cases should be made final as far as possible. Where the presumptive reversioner or with the permission of the Court, a more remote reversioner brings such a suit, the Court ought to require him to disclose the names of other persons interested in the reversion and direct notices to be served on them, to enable them to be made parties should they so desire.

Ayyadurai Pillai v. Solai Ammal, (I.L.R., 24 Mad., 405), approved.

Adilakshmi v. Venkataramayya, (13 M.L.J., 359), not followed.

ONE K, the last male owner of the plaint properties, died in 1853, leaving him surviving P (the second defendant) his widow and L (the third defendant) his mother. The second defendant adopted the first defendant in 1887, whereupon L instituted a suit (Original Suit No. 132 of 1887) to set aside the adoption. A decree was passed declaring the adoption invalid. The first defendant, who was a minor at the time, on attaining majority, instituted a suit (Original Suit No. 147 of 1896) against the second and third defendants to establish his adoption on the ground that his guardian and mother was guilty of negligence in defending Original Suit No. 132 of 1887 and that the decree therein was not binding on him. This suit ended in a compromise whereby the adoption was admitted and the properties were divided, with full powers of alienations between defendants Nos. 1, 2 and 3.

The plaintiff, who was a remote reversioner, entitled to the properties after the death of the third defendant, instituted this suit to set aside as fraudulent the compromise in Original Suit

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No. 147 of 1896 and to establish his right to the properties on the death of the third defendant.

The District Munsif passed a decree in favour of the plaintiff setting aside the compromise and declaring the plaintiff's right as reversioner.

The Subordinate Judge confirmed this decree on appeal.

The second defendant preferred this second appeal.

The case came on for hearing in the first instance before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Sankaran Nair, J., who made the following

ORDER OF REFERENCE TO A FULL BENCH.—The plaintiff, claiming to be the reversioner entitled to succeed to the estate of the late Krishnabrahmam after the demise of the third defendant, the deceased owner's mother and presumptive reversioner, brought this suit for a declaration of the invalidity of the adoption of the first defendant as son to the said Krishnabrahmam by his widow the second defendant. In Original Suit No. 132 of 1887 on the file of the District Munsif's Court at Masulipatam, the mother, the presumptive reversioner referred to above, brought an action against the first defendant and obtained a decree declaring his adoption invalid. That defendant who had been a minor at the time of the said litigation and decree instituted Original Suit No. 147 of 1896 on the file of the same Court to set aside the decree on the ground that his guardian *ad litem* had been guilty of gross negligence in the conduct of the defence, and that his interests had been thereby prejudiced. This latter suit resulted in a compromise whereby the decree declaring the adoption invalid was set aside and the estate of the deceased Krishnabrahmam was divided between the first defendant on the one hand and the widow and the mother second and third defendants) on the other, each set taking a moiety of it. The present suit was instituted on the 20th July 1898.

In *Ayyadorai Pillai v. Solai Ammal*(1) in which I took part it was held that the plaintiff (a reversioner) was for purposes of limitation under article 118 of the Limitation Act, a person claiming under his mother, the presumptive reversioner. The current of authority in recent years has been to the effect that, in so far as the right of a reversioner to set aside alienations of property made by qualified Hindu female owners is concerned, the right is a personal

(1) I.L.R., 24 Mad., 405.

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one and that a reversioner not party to a suit instituted by another reversioner with reference to such alienations, is in no way affected by the result of the suit. It seems to me, however, that a dispute relating to an adoption involving as it does matters of family law and status should not be treated as standing on the same ground as a dispute with regard to mere transfer of property by a qualified owner. The inexpediency of allowing disputes, especially of the former class, to be enquired into in Courts of Justice after the lapse of a reasonable time must be obvious and of course this is what the Judicial Committee had in mind when they observed:—"It seems to their Lordships that the more rational and probable principle to ascribe to an act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption, by virtue of which the defendant is in possession" (*Jagadamba Chowdhrami v. Dakhini Mohun*(1)). The attainment of this end, viz., compelling litigation for the direct purpose of attacking an adoption to be started within a reasonable period will be frustrated if, in regard to it also, the right of each and every reversioner is to be viewed as altogether personal to him; for, in that view one who does not come into being till many years after the adoption, must be conceded the right of impeaching it should he stand in the position of a reversioner, notwithstanding that till then those in similar position did not think fit to challenge it. Strong grounds therefore would seem to exist for holding that the presumptive reversioner or reversioners represent remoter reversioners in the matter of litigation affecting adoptions prejudicial to the rights of all of them alike. I say all of them alike, notwithstanding, that the right of impeaching an adoption is in the first instance conceded to the presumptive reversioner or reversioners alone, and that it is only in cases of fraud, acquiescence or neglect on their part or for other adequate reasons, that a reversioner who is not the presumptive reversioner is competent so to impeach; for the concession to the presumptive reversioner of such preferential right to sue is not on the ground of any real distinction between the contingent right of the presumptive

(1) I.L.R., 13 I.A., 84 at p. 95.

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reversioner and that of other reversioners, but for the reason as I take it that otherwise a party claiming by virtue of the adoption would be exposed to harassing multiplicity of actions. To my mind, therefore, it seems to be but just and expedient to treat the presumptive reversioners not guilty of fraud or misconduct in the matter as representing remoter reversioners interested like themselves in impeaching an adoption, both with reference to the conduct of litigation relating thereto and with reference to limitation. This view would seem to be almost indispensable with reference to the decision of the majority in *Ratnamasari v. Akilandammal*(1) whereby the application of article 118 of the Limitation Act is extended even to suits not merely declaratory, since to ascribe to such litigation a representative character may tend to minimise the anomalies pointed out in Mr. Justice Bhashyam Ayyangar's dissenting judgment in that case. For example, take the case of the presumptive reversioner suing to have an adoption declared invalid and, as the result of contentious litigation, the suit being decreed in his favour. If that decree is not to enure to the benefit of reversioners not plaintiffs in the suit, it will follow that any one of that class who eventually becomes entitled to possession, the adoption failing, will lose the property unless he can show that his knowledge of the adoption was within six years of the time when his right to possession accrued, an obviously unjust result. Again, proceedings such as those which have given rise to the present suit would in that view be rendered unlikely if not impossible, for the decree obtained by the mother declaring the adoption invalid assuming it to have been given after a proper trial would not be affected by the mere consent of one of the reversioners even though of the presumptive reversioner.

It is scarcely necessary to add that in the view adopted in *Ayyadorai Pillai v. Solai Ammal*(2) litigation between reversioners and persons claiming to be adopted may be made really effective in the interests of all parties concerned by service of notice on reversioners other than the actual plaintiff and by giving the conduct of the suit to such of the reversioners as, in the Court's opinion, would best protect the rights of those entitled to the inheritance in default of adoption; whereas, to take the view that the right of suit in cases like the present is purely personal to each

(1) I.L.R., 26 Mad., 291.

(2) I.L.R., 24 Mad., 405.

reversioner, is to offer a premium on multiplicity of litigation since the fact that the adoption is set aside at the instance of one reversioner, presumptive or otherwise, would afford no protection to others similarly interested but not parties to the decree and since these would lose all right to the property when the title thereto fell into possession unless each of them had sued for and secured a decree annulling the adoption.

The state of things which for many years prevailed in Malabar with reference to litigation connected with Tarwad matters after the decision in *Ittiachan v. Velappan*(1) is instructive as to what the conclusion should be if the interests of persons claiming by adoption and reversioners concerned in impeaching the same are not to be altogether ignored as a factor in arriving at such conclusion. When it came to be thought that the decision in the case referred to denied to adjudications in favour of or against a Karnavan as such, any binding character with reference to the other members of the Tarwad, the result was that the matter so adjudicated upon was litigated over and over again to the detriment and injury of all parties until the possession of affairs became almost intolerable. Fortunately *Vasudevan v. Sankaran*(2) which restored to adjudications properly obtained in favour of or against Karnavans the character of adjudications in representative litigation, has had the effect of putting an end to the wasteful and improper litigation which preceded it and the difficulties incident to conflicting decisions on the same point.

It was said that the decision in *Ayyadorai Pillai v. Solai Ammal*(3) had overlooked the difference between the case of a qualified owner entitled to present possession who undoubtedly is allowed a representative capacity and that of a merely presumptive reversioner. The latter, no doubt, is unlike the former in the matter of possession. But that is in truth not material in connection with the question under discussion. For, the effect of an adoption impeachable by reversioners is necessarily unconnected with the question of present possession and is precisely the same with regard to every one of them. It is this identity of contingent injury that in my view warrants the conclusion of representativeness on the part of the reversioners preferentially allowed to sue in

(1) I.L.R., 8 Mad., 484.

(2) I.L.R., 20 Mad., 129.

(3) I.L.R., 24 Mad., 405.

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respect of what constitutes the common obstacle to their future right, as it is an analogous similarity of common injury that is the foundation of the representative character admittedly possessed by a qualified owner entitled to present possession, this last circumstances being merely the reason for giving her the foremost right to sue.

My attention was also drawn to the observations of Mukerjee, J., in *Harek Chund Bobu and others v. Bijoybhund Mahulal*(1) as opposed to the conclusion that the plaintiff in *Ayyadorai Pillai v. Solai Ammal*(2) was a person claiming through or under his mother the presumptive reversioner, within the meaning of section 3 of the Limitation Act. The construction of the passage defining "plaintiff and defendant" in section 3 of that Act adopted by the learned Judge in that case seems to assume that none who is not an heir or legal representative or assign in the strict sense of those terms is a person "claiming through or under another" within the meaning of the above definition. If that is the correct view of the learned Judge's reasoning, it would exclude cases of successors who are not heirs in the strict sense of the term from the operation of the definition and would be inconsistent with the decisions holding differently, as for instance those relating to succeeding trustees, mahants and Malabar Stanis who have been treated as claiming through or under their predecessors.

I am therefore unable to persuade myself that the principle on which *Ayyadorai Pillai v. Solai Ammal*(2) rests is not sound.

If that principle is to be applied to the present case it would follow that the plaintiff would be entitled to a declaration that the decree in Original Suit No. 132 of 1887 establishing the invalidity of the adoption of the first defendant is unaffected by the compromise entered into in Original Suit No. 147 of 1896 and that the former decree is binding on the first defendant until it is duly set aside.

But in *Adilakshmi v. Venkataramayya*(3) doubt has been cast upon *Ayyadorai Pillai v. Solai Ammal*(2) though the latter is referred to without disapproval and distinguished in *Govinda Pillai v. Thayammal*(4).

(1) 2 C.L.J., 87.
(2) 18 M.L.J., 359.

(3) I.L.R., 24 Mad., 405.
(4) I.L.R., 28 Mad., 57.

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I would therefore submit for the opinion of the Full Bench the question whether the presumptive reversioner the mother should be taken to have acted in a representative capacity in obtaining the decree in Original Suit No. 132 of 1887 on the file of the District Munsif's Court at Masulipatam.

The case came on for hearing in due course before the Full Bench constituted as above.

V. Krishnaswami Ayyar and K. Subrahmania Sastry for appellant.

T. Rangachariar for the Hon. Mr. P. S. Sivaswami Aiyar for first respondent.

The Court expressed the following

OPINION.—The question in this case is whether the third defendant, the mother of one Krishna Brahman, deceased, and his presumptive reversioner, in suing for and obtaining a decree declaring the adoption of the first defendant as son to Krishna Brahman made by his widow the second defendant, acted in a representative capacity with reference to the plaintiff the next reversioner and the other ulterior reversioners, assuming that the decree was obtained without fraud or collusion and after a fair trial.

The question was argued by Mr. Krishnaswamy Aiyar on behalf of the first defendant and Mr. Rangachariar on behalf of the plaintiff very fully and ably, and our attention was drawn to a number of decisions more or less bearing on the matter. It will be convenient first to collate such of these cases as are really pertinent, even if but to a limited extent, and then to examine the question with reference to the principle involved. The cases relied on, speaking generally, fall under two main heads: (1) those relating to alienations of property forming part of the estate of a deceased full owner by a widow or other successor thereto who takes only a qualified interest, and (2) those relating to adoption by widows.

Taking up the former, in *Tekaiti Doorga Persad Singh v. Tekaitri Doorga Konwari*(1), one Doorga Konwari, mother of the late full owner, had executed a deed of sale of a portion of the estate to a person named Joy Mungul. The estate was impartible and the plaintiff Doorga Persad as the eldest male heir in the eldest branch of the second degree in the family sued *inter alia* for a declaration

(1) L.R., 5 I.A., 149.

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of the invalidity of the deed by the qualified owner alleging a *Koolachar* or family custom by which he claimed to be entitled to *Doorga Konwari*. The High Court found against the *Koolachar* and dismissed the suit. This dismissal was upheld by the Judicial Committee but not on the grounds on which the High Court had proceeded. Their Lordships considered that even if the finding as to the *Koolachar* relied on by the plaintiff were in his favour, it would still be necessary to remit the case for a finding as to how far the alienation was justified by necessity, and as so to remit the case would lead to expense and delay, they confirmed the decree of the High Court, but at the same time set aside the finding of that Court as to the *Koolachar* leaving it open to the plaintiff and others to litigate that matter in the future. As one of the reasons for their Lordships thus declining to grant a declaration in the exercise of their discretion they observe:—

“And if the enquiry (as to the necessity for the deed) should result in a finding favourable to *Joy Mungul*, the decision might not be final in his favour because the present plaintiff might die in the life-time of the widow, and the estate might never come to him” (p. 163).

In *Ieri Dut Koer v. Mussumut Hansbutti Koerain*(1). Observations of similar character were also made and they ran thus:—

“The only reason assigned for refusing relief on the ground of discretion is that part of the case raises a difficult point of law, the decision of which, though involving expense and delay, may after all not be binding on the actual reversioners. That may be a reason more or less weighty according to circumstances. In this case it does not apply to the original estate of *Budnath*, as to which the plaintiffs are clearly right and the defendants clearly wrong in their contention. Nor is it readily conceivable that the decision will be fruitless; because the question of law is of such a nature that its decision though not binding as *res judicata* between the widows and a new reversioner would be so strong an authority in point as probably to deter either party from disputing” (p. 157).

Of the decisions under this head by Courts in this country those most relied on by Mr. Krishnaswami Aiyar were *Sakyahani Ingle*

(1) L.R., 10 I.A., 150.

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Rao Sahib v. Bhavani Bosi Sahib(1), *Bhagwant v. Sukhi*(2), *Govinda Pillai v. Thayammal*(3) and *Abinash Chandra Mazumdar v. Harinath Shaha*(4). In the first of these cases a Division Bench of this Court held that in a suit brought by a reversioner to impeach an alienation by a qualified owner, the right did not survive on the death of the plaintiff to the next reversioner. In the Allahabad case the deceased full owner's daughter's sons sued in 1894 for a declaration of the invalidity of an alienation made in 1876 by their maternal grandmother, the widow of the full owner. At the date of the alienation as well as at the date of the plaintiff's suit their mother was the presumptive reversioner, but she had omitted to take legal proceedings for impeaching the alienation. The Full Bench held that the suit was not time barred, one ground for the decision being that no reversioner under the Hindu Law presumptive or otherwise represented another reversioner for the purposes of limitation with reference to declaratory suits of the description before the Court, dissenting from *Pershad Singh v. Chedee Lal*(5) and *Chhaganram Astikram v. Bui Motigavri*(6). In *Govinda Pillai v. Thayammal*(3) a Division Bench of this Court following the Allahabad case gave a similar decision, and *Brett and Mookerjee, JJ.*, held the same in *Abinash Chandra Mazumdar v. Harinath Shaha*(4).

Passing to the cases under the other head, viz., those relating to adoption by a Hindu widow, so far as the Privy Council is concerned there is nothing more than the following observation in *Jumona Dassya v. Banasoonderai Dassya*(7):—“They (their Lordships) give no opinion as to what the effect of a decree in such a suit may be, whether one in favour of the adoption is binding against any reversioner except the plaintiff or whether, on the other hand, a decision adverse to the adoption would bind the adopted son as between himself and anybody except the plaintiff. All their Lordships can do on the present occasion is to say that *Jumona* has not made out her right to have this adoption declared invalid.”

As regards the tribunals in this country, the Bombay High Court has apparently not been called upon to give any decision in

(1) I.L.R., 27 Mad., 588.

(3) I.L.R., 28 Mad., 57.

(5) 15 W.R., 1.

(7) L.R., 3 I.A., 73 at p. 84.

(2) I.L.R., 22 All., 33.

(4) I.L.R., 32 Calc., 62.

(6) I.L.R., 14 Bom., 512.

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such a matter. The same is the case as regards the Calcutta High Court, though the decision of the Division Bench already referred to in *Alinash Chandra Mazumdar v. Harinath Shaha*(1) shows that the learned Judges who decided it were prepared to hold that there was no distinction between litigation on the part of reversioners concerning alienations by qualified female owners and such litigation connected with adoptions by widows. In Allahabad it was held in an unreported case referred to in the Full Bench judgment already cited that no reversioner presumptive or otherwise represented in point of law any other reversioner even in suits in which adoptions are impeached *Bhagwanta v. Sukhi*(2), and that must be taken to be the rule finally accepted in that province having regard to the approval which that decision has received at the hands of the Full Bench. So far as this Court is concerned there is a direct conflict of authority. In *Adilakshmi v. Venkataramayya*(3) the representative character was denied while in *Ayyadorai Pillai v. Solai Ammal*(4) it was conceded, this latter case being distinguished and not dissented from *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib*(5), and *Govinda Pillai v. Thayammal*(6).

This is how the cases stand. Mr. Krishnaswami Aiyar's contention was that the right of a reversioner to impeach an alienation of property by a qualified Hindu female owner and his right to impeach an adoption by a Hindu widow rest in essence on identical grounds, and that, logically, as well as according to the preponderance of authority, the right should be held to be no more than personal to each individual reversioner presumptive or otherwise.

The argument of Mr. Rangachariar on the other side was that in spite of the view generally adopted in recent decisions by this High Court and by the Allahabad and the Calcutta High Courts in cases connected with alienations of property by qualified female owners, the view which best accords with principle is that the presumptive reversioner does occupy a representative position; and that, having regard to the fact that disputes regarding the truth or validity of an adoption involve questions of family status, the view accepted in *Ayyadorai Pillai v. Solai Ammal*(4) should

(1) I.L.R., 32 Cal., 62.

(3) 18 M.L.J., 359.

(5) I.L.R., 27 Mad., 588.

(2) I.L.R., 22 All., 33 at pp. 44, 45.

(4) I.L.R., 24 Mad., 405.

(6) I.L.R., 28 Mad., 57.

be affirmed in preference to that laid down in *Adilakshmi v. Venkataramayya*(1) at all events with reference to suits relating to adoptions.

The question raised is by no means easy to answer, but on full consideration we think that the view contended for by Mr. Rangachariar ought to prevail.

Now, what in fact is the true character of the right of a reversioner under the Hindu Law to impeach an alienation by a qualified female owner or an adoption by a Hindu widow? His interest involves nothing of a present proprietary nature. His right, no doubt, is a consequence of the doctrine of reverter incident to the qualified estate of females taking as heirs of a deceased Hindu. But none of these reversioners, speaking strictly, can be said individually to possess any certain or tangible interest in the reversion; for the person who will get it is only he who shall actually survive the qualified proprietor and who shall occupy at her death the position of heir to the last full owner, and who that will be it is of course impossible beforehand to say. In short, these would-be-claimants under the Hindu Law to a future estate with possession are quite unlike the owners of reversion as known to the system of law from which the term has been borrowed, for the obvious reason that the right of such owners is indefeasible while the right of these so-called reversioners is defeasible by their death in the life-time of the qualified owner (compare Collet's 'Specific Relief Act,' 2nd edition, p. 283). All that these can rely on is a possibility of succeeding or a "*Spes successionis*" to use the language of the Judicial Committee in *Bahadur Singh v. Mohar Singh*(2). This from the very nature of the case is so with reference to every reversioner irrespective of the proximity or remoteness of his relationship to the full owner.

In conceding a right of suit to persons possessing an interest of this defeasible character, the law provides a very exceptional remedy, and in the comparatively early case of *Kattama Nachiar* the Judicial Committee advert to this when they say, "The arguments now under consideration are founded on the right of a reversioner to bring a suit to restrain a widow or other Hindu female in possession from acts of waste although his interest during her life is future and contingent. Suits of that kind form

(1) 18 M.L.J., 359.

(2) L.R., 29 I.A., at p. 9.

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a very special class and have been entertained by the Courts 'ex necessitate rei'."

It is needless to add that the true purpose of the concession of a right of suit in all these cases is the protection of the interest of the person or persons who may eventually turn out to be the heir or heirs, and the object of the legal proceeding is really the perpetuation of testimony which, owing to lapse of time, might not be available for the heir when the succession actually opens. Now as it is not possible either to determine beforehand who will be the actual successor or to predicate the existence of any substantial distinction between the right of one reversioner and that of another, in theory, it would seem that, the right to take legal proceedings for perpetuation of testimony should be conceded to each and all of such persons. That, however, having regard to the contentious character which the proceeding assumes, would be an intolerable hardship on the transferee from the qualified owner or the alleged adopted son as the case may be. Hence the rule laid down by the Judicial Committee in *Rani Anund Koer v. The Court of Wards* (1) in terms which may aptly be quoted here in full:—

"Their Lordships are of opinion that although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir, that is to say, by the person who would succeed if the widow were to die at that moment. They are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves from interfering. They consider that the rule laid down in *Bhikaji Apaji v. Jagannath Vithal* (2) is correct. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue: see

(1) L.R., 8 I.A., 14 at p. 22.

(2) 10 B.H.C.R., 351.

Koer Goolab Sing v. Rao Kurun Sing (1). In such a case upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit."

The rule thus laid down furnishes, as Mr. Rungachariar urged, practically conclusive proof that the correct view of the law on the point is that a reversioner allowed to maintain such a suit does thereby act, not only for himself, but also on behalf of all the rest, for the selection of one out of a body of persons possessing a common or similar interest as the individual empowered to carry on legal proceedings for the vindication of such interest necessarily involves the concession to him of a representative capacity in the matter. Some observations by *Sir Barnes Peacock* in *Brojo Kishoree v. Sreenath Bose* (2) may also be cited as in point. He said:

"It might be very reasonable, at the instance of a presumptive reversionary heir whose estate would not accrue until the death of the widow, to try whether an adoption made by a widow was valid or not, and, upon proof of the invalidity of the adoption to declare that it was invalid. In such a case, if the reversionary heir should be compelled to wait until the death of the widow, before they could get the question tried as to the validity of the adoption, they might have to wait until after all the witnesses who could prove the invalidity of it were dead for the widow might outlive all the witnesses. Such a suit might, we apprehend, be maintained by the presumptive reversionary heirs for the benefit of the persons whether themselves or others, who might be the heirs of the husband at the time of the widow's death, in the same manner as the presumptive reversionary heirs may sue to restrain a widow from committing waste, although, if the widow should survive them, they would sustain no injury by the waste. It is unnecessary for the Court now to determine whether, if in such a case the defendant should succeed in establishing the validity of the adoption, the decree would not be binding upon the persons who might eventually succeed upon the death of the widow in the same manner as a decree against

(1) 14 M.I.A., 198.

(2) 9 W.R., 463 at p. 465.

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the widow representing the rights of her husband in an estate is binding upon the reversionary heirs. It has been decided by the Privy Council that such a decree is binding upon the reversionary heirs in *Ranee Surnomoyee's* case(1). This of course is upon the assumption that the suit is honestly brought and conducted."

Though the matter was not actually decided, yet, it is perfectly clear from the terms of the observations that that eminent Judge's inclination of mind was in favour of holding that the decision in such a case would be binding upon whomsoever may become entitled to the succession, and that the position of the reversioner suing was analogous to that of the widow who is entitled to the possession of her husband's estate and who is unquestionably recognized as representing all his successors.

Further in dealing with the question, it is of course necessary not to overlook the grave and important nature of disputes relating to adoptions. The Judicial Committee has had occasion more than once to dwell on it. In *Rajendro Nath Holdar v. Jogendro Nath Banerjee*(2) their Lordships pointed out the analogy between disputes relating to adoptions and those relating to legitimacy, and said:

"The case seems to their Lordships to be analogous to one in which the legitimacy of a person in possession is questioned a very considerable time after his possession has been acquired, by a party who has a strict legal right to question his legitimacy. In such a case the defendant in order to defend his *status*, should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons. The case of a Hindu claiming by adoption is perhaps as strong as any case of the kind that can be put; because when, under a document which is supposed and admitted by the whole family to be genuine, he is adopted, he loses his rights—he may lose them altogether—which he would have in his own family; and it would be most unjust after long lapse of time to deprive him of the *status* which he has acquired in the family into which he has been introduced, except upon the strongest proof of the alleged defect in his title."

(1) 2 W.R. (P.C.), 12.

(2) 14 M.L.A., 87 at p. 77.

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Again in *Jumona Dassya v. Bama Soonderai Dassya*(1) reference is made to the particularly heavy onus which lies on plaintiffs in such suits in these terms: "Their Lordships, in making this observation, are not insensible to the nature of the suit. It is one in which she, upon a remote and contingent interest, an interest which will probably never accrue to her, comes into Court, not only to destroy the title of a person in possession of an estate, but to destroy his civil status; and therefore a more than ordinary burden of proof lies upon her." Lastly there are the well-known observations of Lord Hobhouse in *Jagadamba Chowdhrani v. Dakhini Mohun*(2) which conclude thus:—

"It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption, by virtue of which the defendant is in possession."

Therefore whether regard is had to the theoretical ground on which the right to sue in cases like the present is accorded to reversioners, or to the character of the issue involved in the litigation from the point of view of the person claiming under the adoption, the justice and expediency of making adjudications in such cases final as far as possible, is manifest. And this desirable end may be easily secured by adopting appropriate procedure. The presumptive reversioner, or, where in the discretion of the Court a remote reversioner is allowed to sue, the remote reversioner, ought to be required to disclose the names of other persons interested in the reversion, so far as may be practicable, and notice should be served upon them of the commencement of the proceeding in order to enable them to apply to be made parties should they wish to do so. They may join as plaintiffs or if unwilling to join as plaintiffs they may be made defendants. This was contemplated in the leading decision on the point (*Rani Anund Koer v. The Court of Wards*(3)), as will be seen from the concluding clause in the quotation from the case already made, "and would probably require the nearer

(1) L.R., 3 I.A., 72 at pp. 81 and 82. (2) L.R., 13 I.A., 84 at p. 95.
(3) L.R., 8 I.A., 14 at p. 23.

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reversioner to be made a party to the suit." When such a course is adopted the reversionary right will be well protected, and in cases of necessity the conduct of the suit may be entrusted by the Court to the reversioner or reversioners who would act most effectively in the interest of all possessing the *spes successiois*.

In the case in *Abinash Chandra Mazumdar v. Harinath Shaha* (1) and in other cases referred to therein, it was held that a remote reversioner is not precluded by the existence of a nearer female reversioner from suing without showing fraud or other cause within the ruling in *Rani Anund Koer v. The Court of Wards* (2) on the part of such nearer reversioner, and it was argued by Mr. Krishnaswami Aiyar that those decisions render it impossible to hold that the remote reversioner should be represented by any female reversioner. This argument has no real force.

In holding that a remote reversioner can sue notwithstanding the existence of a nearer female reversioner without proof of collusion, etc., on the part of the latter, *Muttuswami Ayyar* and *Handley, J.J.*, in *Subbayya v. Krishna* (3) relied upon the decision in *Thakurain Ramanund Koer v. Thakurain Raghunath Koer* (4) where it was held that a suit by remaindermen for a declaration was not barred by the non-joinder as plaintiff of another remainderman entitled to take in priority to the plaintiff, both taking under the same will. Now the established rule of English Law applicable to the case of such remaindermen was laid down by Lord Holt in *Pyke v. Crouch* (5) in the following terms:—

"If several estates in remainder be limited in a deed, and one of the remaindermen obtains a verdict for him in an action brought against him for the same land; that verdict may be given in evidence for the subsequent remainderman in an action brought against him for the same land, though he does not claim under the first remainderman, because they all claim under the same deed."

Mr. Krishnaswami Aiyar's argument against conceding to any reversioner male or female, the right to bind others, which he rested on the words of section 13 of the Civil Procedure Code, viz., "under whom they or any of them claim," overlooks what was

(1) I.L.R., 32 Cal., 62.

(2) I.L.R. 14 Mad., 186 at p. 195.

(3) Lord Raymond's Rep., Vol. I 730.

(2) L.R., 8 I.A., 14 at p. 23.

(4) L.R. 9 I.A., 41.

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pointed out by *Latham, J.*, in *Ahmedbhoy Hubibhoy v. Vullubhoy Cassumbhoy* (1) at page 715 of the report where the learned Judge says that that section is not exhaustive of the law of *res judicata* and that cases of representative litigation are left unprovided for thereby (see also *Stokes' 'Anglo-Indian Codes,' Vol. II at p. 393*).

The view which we have taken as to the character of the suit by a reversioner to impeach an adoption cannot be understood as in real conflict with the dicta in *Tekait Doorga Persad Singh v. Tekaitri Doorga Konwari* (2) and in *Isri Dut Koer v. Mussumut Hansbutti Koerain* (3) quoted in the beginning of this judgment: for there the disputes were as to *alienations* by qualified proprietors. And the express reservation of the opinion of the Judicial Committee in *Jumocna Dassya v. Bamasoonderai Dassya* (4) as to the effect of a decision in a reversioner's suit relating to an alleged adoption, in which they dwelt on the special character of such suits, precludes our taking the dicta in *Tekait Doorga Persad Singh v. Tekaitri Doorga Konwari* (2) and *Isri Dut Koer v. Mussumut Hansbutti Koerain* (3) as covering cases of adoption also. No doubt, as already shown, the right to impeach an alienation and the right to question an adoption rest upon the same basis, viz., the necessity to protect the reversionary interest; but there is little in common between what disposes of one's whole life, such as an adoption, and what relates to mere transfers of items of property. This vital distinction between the two classes of cases was ignored, and even the precisely similar character of the interests of one and all of a number of persons sharing in the same hope of succession as well as the interconnection existing between them in the matter of the right to sue was overlooked in the Full Bench case of *Bhagwanta v. Sukhi* of the Allahabad High Court (5) and on which Mr. Krishnaswami Aiyar strongly relied. In short, the whole conception in that case of the nature of the reversioner's right to sue is vitiated by the assumption that the right resides exclusively in the presumptive reversioner for the time being, and that not only on his death but also on his failure to sue within the limited time or on the occurrence of other circumstances justifying a suit by a remote reversioner, there is an extinction of that presumptive reversioner's right and a similar

(1) I.L.R., 6 Bom., 703 at p. 715.

(2) L.R., 10 I.A., 160 at p. 157.

(3) I.L.R., 22 All., 33.

(2) L.R., 5 I.A., 149 at p. 163.

(4) L.R., 3 I.A., 72, p. 84.

(5) I.L.R., 22 All., 33.

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exclusive right springs up in favour of the person next in the line of succession and so on. The unsoundness of this assumption will be seen at once if it is remembered that a presumptive reversioner whose right to sue for a declaratory decree is barred under article 125 of the Indian Limitation Act, can nevertheless under article 141 maintain a suit for possession if he survives the qualified owner.

This assumption has led the Allahabad Court to the further view that distinct causes of action accrue to the different reversioners in succession with reference to the same act of alienation—a view which is opposed to the principle of the decisions cited in the note 11 at p. 183 of Mittra on 'Limitation,' 4th edition.

Where there is an alienation by a qualified owner, what injures the reversion is nothing but the unauthorized character of the transfer, and the moment such a transaction takes place a cause of action accrues to one and all interested in the reversion to have it declared that the transfer cannot operate beyond the qualified owner's life. In other words, there is but a single cause of action to be sued upon by the person or persons permitted to sue according to the rule enunciated in *Rani Anund Koer v. The Court of Wards*(1). It is impossible to see how it can properly be held that from one and the same act of alienation successive causes of actions spring up, as it were, merely because the reversioner having the preferential right to sue allows the time given for such a suit to lapse. We think that the more correct view is that reversioners who are likely to be affected by the inaction of those above them in the line of succession will be barred unless they themselves sue within the time applicable to their case from the date of the alienation by which their possible future right was infringed. The Allahabad Judges in dissenting from the decisions in *Pershad Singh v. Chedee Lall*(2) and *Chhaganram Astikram v. Bai Motigavri*(3) according to which the cause of action for a declaratory decree accrues once for all on the date of the alienation, seem to think that their view derives support from the provisions of the present Limitation Act. No doubt the language of column 1 of article 125 is not literally applicable to a suit by a remote reversioner who is allowed in the discretion of the Court to sue owing to the collusion, neglect, etc., of the presumptive reversioner, but the apparent difficulty presented

(1) L.R., 8 I.A., 14 at p. 22. (2) 15 W.R., 1. (3) I.L.R., 14 Bom., 512.

by such language may be obviated by construing the words "Hindu . . . who if the female died," etc., in the article, as comprehending, for the purposes of the article, a remote reversioner allowed by law to sue in his stead. Having regard to the heading of column (1)—"Description of suit" we think it is permissible to hold that the language of article 125 is intended rather to describe the character of the suit than to strictly limit the persons who may bring such suits. This construction is, we think, warranted by the analogy of the Privy Council decision in *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*(1) and by those decisions in which succeeding *Mahants* and *Malabar Stanis* have been treated as persons claiming through or under their predecessors, though in strictness they do not so claim. On the other hand the recognition of successive rights of suit with reference to each man in the line of heirs, not only those in existence at the time of the alienation but even those who come into being in the indefinite future, unknown as such rights were to the substantive law at the time of passing of the present Limitation Act, and in the absence of statutory provisions introducing new rights of that class, is judicial legislation of a character which it is difficult to justify. In *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*(1) just referred to, *Sir Richard Couch* said that "The Hindu Law of Inheritance did not permit the creation of successive life estates in this endowment." This objection to successive life estates applies with even greater force to the creation of successive contingent reversionary interests for the purpose of impeaching the acts of the qualified owner.

In *Chhaganram Astikram v. Bai Motigavri*(2) where *Birdwood* and *Jarline, JJ.*, in dealing with the application of article 120 to the case of a suit for a declaration of the invalidity of a Court sale held in execution of a decree against a widow beyond her life, express themselves as follows:—

"It could not have been the intention of the Legislature in giving a right to sue for a declaration within six years from the accrual of the right, to give successive rights to a series of successive reversioners to harass the alienees of an estate with repeated suits in respect of the same alienation. It has been held that when the widow dies, a new right of action (for possession) will be given to

(1) L.R., 27 I.A., 69 at p. 78. (2) I.L.R., 14 Bom., 512 at p. 515.

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the reversioner then living (see *Srinath Kur v. Prosunno Kumar Ghose*(1)) but till then, at any rate, any right to seek a declaration possessed by any reversioner whose title to sue had accrued after the alienation must be regarded as derived from the person who was the heir presumptive at the time of the alienation."

If it be thought that it would be going too far to hold that article 125 applies to a suit for a declaratory decree by a reversioner, who is not the presumptive reversioner, the only alternative would be to lay down that the right to sue in such a case accrues within the meaning of article 120 at the date of the alienation.

No doubt to hold that such a suit is governed by article 125, and to sustain at the same time the decision in *Visalakshi Ammal v. Sivaramien*(2) is anomalous. But the doctrine, for instance, that possession adverse to the widow, does not affect the reversioner as enacted by article 141 of the Limitation Act while she nevertheless represents those who take in succession to her in the matter of *res judicata* is not less anomalous. If it be considered that consistency requires that uniformity of rules should prevail in regard to both the classes of suits by reversioners, viz., those relating to alienations and those touching adoptions, we think that the better course would be to treat the plaintiff in the former as for every purpose acting on behalf of all the others interested like him in questioning the unauthorized transfer, rather than to deprive the plaintiff in a suit against the alleged adopted son of the representative character which the peculiar nature of that description of litigation, as already shown, makes it imperative to ascribe to the plaintiff in such cases.

We should not conclude without noticing an objection which Mr. Krishnasawmi Aiyar very strongly pressed. If we followed him correctly, his argument was that in the recognized instances of the manager of a joint Hindu family, and of a Malabar *Karnavan*, and of a Hindu widow taking as heir to her husband and the like, it is possession coupled with the capacity to bind others by alienation according to the substantive law, that constitutes the sole ground for according to them the capacity to represent the other persons interested in the litigation, and that as no reversioner is bound by a transaction entered into by another with reference to the reversion, representation in cases like the present cannot in law be allowed. The rule as to remainder men, as laid down in the

(1) I.L.R., 9 Calo., 324.

(2) I.L.R., 27 Mad., 577, at p. 598.

passage already cited from the judgment of Lord Holt in *Pyke v. Crouch*(1) is alone sufficient to refute this objection. Its unfounded character will be further seen from the "Note on parties" in Mitford's Chancery Pleadings where, after a review of the authorities, the true ground of the doctrine of representation of parties is thus shortly indicated:—

"The fact would seem to be that there is no actual representative existing as a ground for the adjudication in the absence of the persons interested; but that there is a virtual and constructive representation for the purposes of the adjudication, as the result of considerations of necessity or convenience and community of interest. Necessity or convenience, combined with community of interest, and not representation, is the criterion for deciding whether such adjudication shall take place (5th Edn., page 409)."

The result of the view that we take is that, though in suits relating to alienations by a qualified owner, the *dicta* of the Privy Council preclude our holding that the presumptive reversioner represents remote reversioners, yet in suits to set aside an adoption the presumptive reversioner ought, on principle, to be held to represent the remote reversioner, provided the matter is decided after a fair trial.

The same principle must, of course, apply to a remote reversioner allowed to sue under special circumstances to set aside an adoption. A further conclusion to which we have been led is that an unauthorized alienation by a qualified owner gives rise to a cause of action for a declaratory suit from the date of the alienation to all the reversioners.

Though Davies, J., has not had the opportunity of perusing this judgment, yet he agrees with us in the answer to be given to the question referred.

We accordingly answer the question submitted for our opinion in the affirmative.

The appeal came on for final hearing in due course before Subrahmania Ayyar and Sankaran Nair, JJ., when the Court, after the expression of the opinion of the Full Bench, delivered the following

JUDGMENT.—Following the Full Bench ruling we dismiss the Second Appeal with costs.

(1) Lord Raymond's Rep., Vol. I, p. 730.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

RANGANADHA MUDALIAR AND ANOTHER (FIRST PLAINTIFF),
APPELLANT,

v.

BAGHIRATHI AMMALL AND OTHERS (DEFENDANTS NOS. 1 AND
3 TO 6), RESPONDENTS.*

Hindu Law—Gift—Settlement on persons then in existence at close of a life in being valid—Trusts Act II of 1882, s. 6—Transfer of Property Act IV of 1882, ss. 14, 15 and 123—Trust validly created by registered instrument without delivery of possession—Sections 14 and 15 of the Transfer of Property Act do not affect any rule of Hindu Law.

R. by a registered deed of settlement settled property in trust, and after making various provisions for the maintenance of himself and his wife and his grand-daughters V. and Z., further provided that on the death of the survivor of the grand-daughters, the trustees were to hold the property in trust for the sons of the grand-daughters who should attain 18 and the daughters of the grand-daughters who should attain that age or marry. A female child on the consummation of marriage or on attaining 18 was to be given Rs. 1,000, and a male child on attaining age was to be given his share of the property.

The settler did not give possession of the properties to his trustees but remained in possession till his death.

In a suit by the reversioners of R. to set aside the settlement as null and void :
Held, that a transfer of property and a valid declaration of trust were effected by the registered deed though unaccompanied by physical delivery of possession, and that nothing in section 6 of the Trusts Act was in conflict with this view.

Held also, that the settlement by way of remainder in favour of the sons of V. & Z. (such sons being in existence at the date of the settlement) was valid under the Hindu Law.

A settlement by way of remainder to take effect on the happening of an event following immediately on the close of a life in being is good.

Sreemuthy Soorjmoney Dossee v. Denobundoo Mulluk, (9 M.I.A., 134), followed.

A bequest to a class, some of whom could not take, is not void but will enure for the benefit of such of the class who can take. The rule in *Leake v. Robinson* (2 Mer., 363), does not apply to the wills of Hindus.

Bhagabati Barmanya v. Koli Charan Singh, (I.L.R., 32 Cal., 992), referred to and followed. *Ram Lal Sett v. Kanai Lal Sett*, (I.L.R., 12 Cal., 663), referred to and followed.

Sections 14 and 15 of the Transfer of Property Act do not affect the rule of Hindu Law above stated, and do not apply to Hindu wills.

* Appeal No. 137 of 1902, presented against the decree of M.R.Ry. W. Gopalachariar, Subordinate Judge of Bellary and Salem at Salem, in Original Suit No. 5 of 1900.

In determining the validity or otherwise of dispositions of property under sections 14 and 15 of the Transfer of Property Act regard must be had to possible events and not to events as they have actually happened; and if it is possible that the vesting may be postponed beyond the limits fixed by the sections, the disposition will be bad, although, as events actually happened, it was not so postponed.

THE plaintiffs as the nephews and next reversioners of the deceased R. sued for a declaration that a deed of settlement executed by R. on the 13th October 1894 was null and void, and that the third and fourth defendants had no interest under the settlement in the properties of the deceased R.

The first defendant B. was the widow of R. and the third and fourth defendants were his minor great grandsons, i.e., sons of his deceased grand-daughters.

In 1894 R. executed a settlement, duly registered, by which his properties were given to trustees who were directed to pay Rs. 100 a month during the joint lives of R. and B. and during the life of the survivor of them and on the death of the survivor, to his two grand-daughters V. and Z. in equal shares. On the death of either of his grand-daughters, the moiety of the monthly allowance was to be given to her male issue. After the death of both the grand-daughters the deed provided 'that the trustees shall stand possessed of the trust property in trust for all or such one or more of the children as being a son or sons shall attain the age of 18 years or being a daughter or daughters shall attain that age or marry.' It was next provided that a female child on the consummation of marriage or on attaining 18 should be paid Rs. 1,000 in full discharge of her claim against the trust property, and that a male child on attaining 18 should be given his share of the property.

The two grand-daughters died within a month of the execution of the deed each leaving an only son, the third and fourth defendants. The settler, R. died in 1899.

On an application to the Collector to register the property in the name of the third and fourth defendants, the plaintiffs objected and were referred to a regular suit. Hence this suit. The Subordinate Judge found the deed of settlement to be valid and dismissed the plaintiffs' suit. Plaintiffs preferred this appeal.

K. Narayana Rao for T. Rangachariar for appellant.

T. Subrahmania Ayyar for first and third to fifth respondents.

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JUDGMENT.—The first ground upon which the deed of settlement of October 13th, 1894 was impeached by the plaintiff was that it was executed by Rajaratna in ignorance of its contents and its legal effect. The suggestion was that when Rajaratna executed the deed he did so under the belief that he was merely appointing his brother-in-law Guruswami as his agent.

The trustees appointed by the deed are Rajaratna's wife and his wife's brother Guruswami. There is not a tittle of evidence that anything in the nature of undue influence was exercised by Guruswami or that Rajaratna was not in full possession of his faculties when he executed the document. The solicitor who drafted the instrument deposed that its contents were explained to Rajaratna. During his lifetime Rajaratna never disavowed or attempted to repudiate the document. His cousin Gopalaswami (the father of the plaintiff), the representative of the branch of the family whose interests were adversely affected by the deed, was aware that it had been executed and took no steps to get it set aside. Rajaratna's wife joined in the deed and conveyed her own private estate to the trustees, and she was also one of the trustees appointed by the deed. It is not suggested that there was any motive for executing the deed such as defeating creditors or otherwise carrying out a sham transaction. The motive for which the deed purports to have been executed, viz., to relieve Rajaratna, who appears to have been a bad man of business, of the responsibility of managing his property and of making provision for his widow and grand-children and their issue, was a perfectly natural one. There is nothing in the circumstances connected with the registration of the instrument, or in the fact that the mitta remained registered in Rajaratna's name, which is inconsistent with the view that Rajaratna knew he was divesting himself of his property and that he intended to do so. It is not necessary to discuss in detail the evidence on which the appellant relied as showing Rajaratna did not know what he was about when he executed the deed. The evidence merely shows that Rajaratna, so long as he lived, continued to take a more or less active part in the management of the property and the trustees were content that he should do so. This is natural enough. On the other hand we find that Rajaratna wrote to his cousin Gopalaswami six months before the execution of the deed (exhibit G) a letter in which, after referring to his money troubles, he stated that

he intended, according to Gopalaswami's advice, to execute a document for the purpose of paying creditors, taking future income for expenses and receiving a fixed monthly income for himself. Again on May 7th, 1896 a mortgage (exhibit L) was executed by Rajaratna and the two trustees in which the settlement of October 13th, 1894 is recited.

We agree with the Subordinate Judge that the plaintiff entirely failed in his attempt to show that when Rajaratna executed the deed he did not know what he was about.

It was further argued on behalf of the appellant that, assuming that Rajaratna understood the effect of the document, the document was inoperative, because Rajaratna did not do all that the law required in order to divest himself of the property. The argument was that something was required over and above the execution of the conveyance and the registration, something in the nature of physical delivery of possession in order to transfer the property. There is nothing in section 6 of the Trusts Act to suggest that trust-property cannot be effectively transferred by a registered instrument. Section 123 of the Transfer of Property Act expressly provides that for the purposes of a gift of immoveable property the transfer must be effected by registered instrument. We see no reason for holding that what is sufficient in the case of a gift of land is not sufficient in the case of a conveyance of land in trust. We are of opinion that the deed in question operates as a transfer of the property and a valid declaration of trust.

The real difficulty in this case is with reference to the terms of the document, and this difficulty arises from the fact that the draftsman has followed forms and has used terms of art, with an imperfect appreciation of their legal effect.

Under the deed, lands are conveyed by Rajaratna and his wife to trustees in trust to pay Rajaratna during his lifetime Rs. 100 a month, or the net income of the property after paying expenses and the interest on a mortgage (the amount in no case to exceed Rs. 100 a month). It was obviously intended, though the deed does not say so, that this payment should be made during the joint lives of Rajaratna and his wife, and during the life of the survivor, because the deed goes on to provide that on the death of the survivor the Rs. 100 a month, or the net income, shall be paid to Vijiavalli and Rukmani the two grand-daughters of Rajaratna in

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equal shares. On the death of either of the grand-daughters the trustees are to pay Rs. 50 a month to the male issue of the deceased grand-daughter and Rs. 50 a month to the surviving grand-daughter for life. The deed further provides that on the death of the survivor of the grand-daughters the trustees are to hold the property in trust for the sons of the grand-daughters who attain 18 and the daughters of the grand-daughters who attain that age or marry and "during the said period" the trustees are authorised to expend Rs. 50 a month on the males of each branch of the family for their support and education.

It is next provided that a female child on the consummation of her marriage or attaining 18 shall be paid Rs. 1,000 in full discharge of her claim against the trust-property and that a male child on attaining 18 shall be given his share of the property. There is a further provision that neither in the female child, nor in the male child of the grand-daughters, the trust-property shall vest until "the said children" in the case of sons attain the age of 18 and in the case of daughters attain that age or marry. Grammatically, no doubt, the words "the said children" should be read as referring to all the children of the grand-daughters who attain 18 or marry. But we do not think this was the intention of the deed. We think the intention was that the words should refer to "the female child" and "the male child" mentioned in the same proviso and that it was not the intention that the vesting should be postponed until all the children attained 18 or married, but that the share of each child in the corpus should vest in interest and in possession when he came of age or (if a female) came of age or married. This construction makes the provision consistent with the preceding provision and puts in a negative form what the preceding provision puts in an affirmative form. The other construction is contradictory of the preceding provision.

The instrument ends with a direction that the divisions and payments referred to in the deed (i.e. the division amongst the sons and the payments to the daughters of the two grand-children) should not be made until after the grand-daughters were past child bearing. As under the deed, on what appears to be the proper construction of the instrument, the division and payments are not to be made until after the death of the survivor of the grand-daughters; this last direction is meaningless and, in attempting to construe the deed, we may ignore it.

Vijiavalli and Rukmani, the two grand-children, married the fifth and sixth defendants who are sons of Guruswami (one of the trustees under the deed). Each grand-daughter had one son and these two sons are the third and fourth defendants. They were both in being at the date of the execution of the settlement. At the date of the death of the surviving grand-daughter they were both minors. The widow (the first defendant) is still living.

The question is—is the gift to the children of the grand-daughters good under Hindu Law or is it bad for remoteness or on any other ground?

The main contention on behalf of the appellant was that the interest was created for the benefit of a class, viz., the children of the grand-children and that, with regard to some members of the class the interest failed since the disposition contravened the law against perpetuities as embodied in section 14 of the Transfer of Property Act, and this being so, the instrument failed as regards the whole class under the provisions of section 15 of that enactment. Section 2 (d) of the Transfer of Property Act provides that nothing in the second chapter of the Act, in which the sections above referred to occur, shall be deemed to affect any rule of Hindu Law. It seems necessary therefore first to consider whether there is any rule of Hindu Law which would govern this case.

Sreemutty Soorjeemoney Dossee v. Denobundo Mullick(1), is an authority for the proposition that under the Hindu Law a settlement by way of remainder on an event to happen immediately on the close of a life in being is good. In the present case all the parties to whom an equitable estate for life was conveyed were in being at the date of the settlement. On the determination of these life estates the trustees were to hold the property in trust for the children of the grand-children who were not of age or, if females, were unmarried and not of age, and as each child came of age, or, if a female, married, the child was to take his or her share of the corpus. (This as has been pointed out seems to us the right construction of the settlement.) During the minority of any male child the trustees were to hold the property in trust to make provision for the maintenance and education of that child.

It seems to us that in the present case the event, viz., the trust in favour of the children of a grand-child was an event which was to happen upon the death of the grand-child or of the widow,

(1) 9 M.I.A., 184.

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whichever should last happen (all being lives in being at the date of the settlement) and that on the authority of the Privy Council decision, the settlement on the children of the grand-children by way of remainder was good. In *Jatindra Mohan Tagore v. Ganendra Mohan Tagore*(1), the Privy Council in dealing with *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick*(2), pointed out that the question in that case was not as to the effect of a gift to a person not in existence, but whether a person in existence might become entitled on a future contingency. The Privy Council in the latter case do not question the soundness of the view taken in the earlier case on the facts of that case, the all important fact being that the donee was in existence at the date of the settlement; and a passage in page 400 indicates that they entertained some doubt as to whether it was essential in all cases that the donee should be in existence at the date of the settlement. The passage runs: "Their Lordships, adopting and acting upon the clear general principle of Hindu Law that a donee must be in existence, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriage or other family provision, for which authority may be found in Hindu Law or usage."

In a recent case the question whether the rule in *Leake v. Robinson*(3), applied to the wills of Hindus was exhaustively discussed before a Full Bench of the Calcutta High Court (*Bhagabati Barmanya v. Kali Charan Singh*)(4), the Full Bench were of opinion that it did not apply. The same view was taken by Garth, C.J., and Sir Arthur Wilson with regard to a gift *inter vivos* in *Ram Lal Sett v. Kanai Lal Sett*(5). We do not think the latter case can be distinguished on the ground suggested, viz., that the grand-children who were in existence at the date of the gift were in that case referred to by name. We agree with these decisions. It seems to us that, notwithstanding that the gift was to a class, and that it was possible that some members of the class might come into existence after the death of the donor, the gift can be upheld under the Hindu Law on the short ground that the third and fourth defendants were living members of the class at the date of the gift.

(1) 9 B.L.R., 377.

(3) 2 Mer., 363.

(5) I.L.R., 12 Calo., 663.

(2) 9 M.I.A., 134

(4) I.L.R., 32 Calo., 992.

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We now proceed to deal with the case upon the assumption that it is governed by the provisions of the Transfer of Property Act. Sections 5 and 6 are the enabling sections. Section 6 provides that property of any kind may be transferred, with certain exceptions whilst section 5 defines "Transfer of Property" as an act by which a living person conveys property, in present or in future to one or more other living persons. As regards section 14 it seems to us that the answer to the question whether the gift to the children of the grand-children contravenes the law against perpetuity as embodied in that section depends upon the construction to be placed upon the words "said children" were they occur in the proviso to the settlement which begins "and provided always that neither in the female child nor in the male child." If these words are to be construed as referring to all the children of the grand-daughters who attain 18 or, if females, marry, we think the gift is bad because, as regard must be had to possible events and not to the events which actually happened, before the gift could take effect a longer period might elapse than the life times of persons in being at the date of the settlement and the minority of some persons in existence at the expiration of that period. If the interest did not vest till all the children of the grand-children came of age, and if children were born after the death of the settlor, the vesting would be postponed until the expiration of a longer period than lives in being and the minority of a person in existence when the lives in being come to an end.

But, as has been already pointed out, this does not seem to us to be the true construction of the deed. We think the words "said children" mean each child, and if the share of each child in the corpus is vested in interest and in possession when he comes of age, the provisions of section 14 are not contravened. If this be the true view, section 15 does not apply and the interest created by the settlement in favour of the children of the grand-children does not fail. No doubt children might have been born to the grand-children after the death of the settlor, but whether the widow died first or the surviving grand-child died first, no child of a grand-child could come into existence after all the estates for life came to an end. Any such child must necessarily in the words of section 14 be "in existence at the expiration of that period."

As regards items 4, 5 and 6 in the deed of settlement we think the finding of the Subordinate Judge that these items of property

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belonged to the first defendant (the widow) and not to Rajaratna, and that the plaintiff has no reversionary interest therein, was right. There seems to be no conceivable reason why the widow should have joined in the deed with her husband and conveyed these lands in trust to herself and her co-trustee if she was not in fact the owner of the lands.

It has been stated that the third defendant has died a minor, since the institution of this suit. For the purposes of this case it is not necessary for us to decide whether his interest in the property passes to the fourth defendant, or whether it lapses to the estate of the deceased Rajaratna. We express no opinion as to this.

We affirm the decree in so far as it declares that the will is not true and the adoption is invalid. Subject to this the appeal is dismissed with costs and the suit is dismissed.

In view of our finding in favour of the deed of settlement the memorandum of objections filed by the defendants was not argued. We dismiss it with costs.

APPELLATE CIVIL.

Before Sir S. Subrahmanya Ayyar, Officiating Chief Justice, and
Mr. Justice Sankaran Nair.

NANNUVIEN AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

MUTHUSAMI DIKSHADAR AND OTHERS (DEFENDANTS
Nos. 1, 2, 4 AND 5 AND LEGAL REPRESENTATIVES
OF THIRD DEFENDANTS), RESPONDENTS.*

1905.
August
16, 29.

*Transfer of Property Act IV of 1882, s. 99—Not merely declaratory of old law—
Purchase by mortgagee of equity of redemption in execution of decree not
based on mortgage—Effect of on the rights of sons of mortgagor.*

Section 99 of the Transfer of Property Act is not merely declaratory of what was accepted and enforced as law before the passing of the Act and effect ought not to be given to the new restrictions imposed by that section so as to give them retrospective operation.

Muthuraman Chetty v. Ettappasami, (I.L.R., 22 Mad., 372), distinguished.

When the mortgagee, at a Court-sale perfected before the passing of the Act, and brought about in respect of a claim independent of the mortgage, purchases the right of redemption in the mortgaged property, such purchase passes to him the whole interest as effectually against the sons of the judgment-debtor as against the judgment-debtor himself and the sons cannot sue to redeem the property so sold, or their share therein.

THE plaintiffs and defendants Nos. 4 and 5 formed an undivided family, the plaintiffs and the fifth defendant being the sons of the fourth defendant. The lands in dispute were mortgaged in 1855 by the fourth defendant to the deceased father of defendants Nos. 1 and 2. Subsequently the father of defendants Nos. 1 and 2 sued the fourth defendant on a claim independent of the mortgage in Original Suit No. 98 of 1866, and in execution of the money decree in such suit attached item I of the plaint properties and purchased the right of redemption at Court-sale in November 1870.

Similarly item II was brought to sale in execution of a money decree against the fourth defendant in favour of the uncle of the third defendant and purchased by the third defendant's brother in August 1870.

* Second Appeal No. 731 of 1903, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 1000 of 1901, presented against the decree of M.R.Ry. A.N. Annantarama Ayyar, District Munsif of Mannargudi, in Original Suit No. 286 of 1900.

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The third defendant is impleaded as being in possession of item No. 2.

The plaintiffs alleging that the two Court-sales were void sued to redeem the lands on payment of the mortgage amount.

The suit was dismissed by the Court of first instance and by the lower Appellate Court.

Plaintiffs preferred this second appeal.

V. Krishnaswami Ayyar for appellants.

The Hon. Mr. P. S. Sivaswami Ayyar for first respondent.

JUDGMENT.—A usufructuary mortgage for two years of two plots of land, items Nos. 1 and 2 of the plaint schedule, for Rs. 170, was made in 1855 by the present fourth defendant, the father of the plaintiffs, to the deceased father of defendants Nos. 1 and 2. In execution of a money decree obtained by the father of defendants Nos. 1 and 2 in respect of a claim against the fourth defendant arising independently of the mortgage, the fourth defendant's equity of redemption in item No. 1 was brought to sale and purchased by the father of defendants Nos. 1 and 2 in 1878. The equity of redemption in item No. 2 was sold in execution of another decree against the fourth defendant obtained by the third defendant's uncle and was purchased by the third defendant's undivided brother. The third defendant redeemed item No. 2 from defendants Nos. 1 and 2 on payment of what was decided in the suit brought by him for the redemption to be the amount properly chargeable on that item out of the mortgage amount of Rs. 170. The plaintiff's present claim to redeem both items was dismissed by the lower Courts. As regards item No. 2 the appeal has not been pressed.

As regards item No. 1 it was urged for the appellants that they were entitled to redeem their share, at least of that item, with reference to the decisions in *Muthuraman Chetti v. Ettappasami*(1) and *Martand Balkrishna Bhat v. Dhando Damodar Kulkarni*(2). The former rests entirely upon the ground that the sale under which the purchaser claimed in that case was one brought about by the purchaser in violation of the provisions of section 99 of the Transfer of Property Act. That section is not merely declaratory of what was previously accepted and enforced as law. Though the necessity for such an enactment was occa-

(1) I.L.R., 22 Mad., 372.

(2) I.L.R., 22 Bom., 624.

sioned among other causes by the practice of mortgagees bringing the properties which formed the subject of their mortgages to sale without actual decrees for sale, yet the obligation or restriction imposed by the section was strictly new. Consequently to follow *Muthuraman Chetti v. Ettappasami*(1) in cases like the present would virtually be to give a retrospective operation to section 99 of the Transfer of Property Act. Even assuming that the principle of the section is itself one to which a mortgagee may, as a matter of equity, be subjected apart from any statutory provisions, as apparently was the view taken in *Martand Balkrishna Bhat v. Dhando Damodar Kulkarni*(2), still, it is clear, we ought not to extend it to cases like the present inasmuch as the purchase of a mortgagor's right of redemption by the mortgagee at a Court-sale brought about by the latter in respect of a claim independent of the mortgage was, prior to the passing of the Transfer of Property Act, so far as we know understood in this Presidency to pass to the purchaser, the whole interest as effectually against the sons of the judgment-debtor as against the judgment-debtor himself. Our attention has not been drawn to any decision to the contrary, and we have no hesitation in saying that we would be unsettling innumerable well-established titles if, as urged on behalf of the appellant, we were to attach to judicial sales perfected before the Transfer of Property Act came into force the consequences which may rightly be annexed to a breach of the provisions of section 99 of that Act in proceedings governed thereby.

The second appeal is dismissed with costs.

(1) I.L.R., 22 Mad., 372.

(2) I.L.R., 22 Bom., 624.

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APPELLATE CIVIL.

Before Mr. Justice Subrahmaniu Ayyar and Mr. Justice Benson.

1906
March 15.

GOVINDA BHATTA (PLAINTIFF), APPELLANT,

v.

NARAIN BHATTA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act IV of 1882, ss. 99, 67—Holder of usufructuary mortgage attaching mortgaged property for a decree on an independent claim may sue under s. 67 on the mortgage.

Where a usufructuary mortgagee, who had no right to sue for his mortgage amount, obtained a decree against the mortgagor on a claim independent of the mortgage and in execution of such decree attached the interest of the mortgagor in the mortgaged properties :

Held, that he was entitled under the provisions of section 99 of the Transfer of Property Act to bring a suit on his mortgage under section 67 of the Act.

The decree in such a suit should be one for the sale of the property free from the mortgage claim and for the application of the sale-proceeds in satisfaction of the mortgages on the property, the balance if any to be applied towards the claim under attachment.

THE plaintiff held a usufructuary mortgage on the plaint properties of which defendants Nos. 1 to 5 were owners. The plaintiff, in execution of a decree for rent against the defendants, attached the equity of redemption in the plaint lands and instituted this suit under section 99 of the Transfer of Property Act for a declaration that he was entitled to recover his decree amount by sale of the equity of redemption. The Court of First Instance and the lower Appellate Court held that, as he was a usufructuary mortgagee, he could not sue for a sale under section 67 of the Transfer of Property Act and that, as the attachment created no charge on the property he could not bring such a suit under section 100 of the Act. His suit was therefore dismissed.

Plaintiff preferred this second appeal.

K. Narayana Rau for appellant.

V. Ryrn Nambiar for respondents.

JUDGMENT.—We think that the decrees of the Courts below are not correct. The question that is raised in this case has to be

* Second Appeal No. 154 of 1904, presented against the decree of H. O. D. Harding, Esq., District Judge of South Canara, in Appeal Suit No. 142 of 1902, presented against the decree of M.R.Ry. T. Jeevaji Row, District Munsif of Puttur, in Original Suit No. 508 of 1901.

determined with reference to section 99 of the Transfer of Property Act read with section 67. No doubt if the attachment had been made on account of the mortgage money itself decreed in a suit which was not brought for the sale of the mortgaged property, then the suit would be, and should be one upon the mortgage, under section 67. The present suit, however, is one where the plaintiff has no right to sue upon the mortgage held by him, it being a usufructuary mortgage. The claim which he has to enforce is one which arose independently of the mortgage and in respect of which he has attached the interest of the mortgagor.

As under section 99 he cannot enforce this claim without a further suit for sale, it follows that he is entitled to maintain a suit for that purpose. Having regard to the object of section 99 the decree to be made in such a suit should not be merely for the sale of the equity of redemption, but should be for the sale of the property free from the mortgage claim of the plaintiff, and the sale proceeds should be applied, in the first instance, to the discharge of the mortgages on the property in the order of their priority, and the surplus, if any, towards the satisfaction of the plaintiff's claim under the attachment so far as may be necessary. The cases of *Jadub Lall Shaw Chowdhry v. Madhub Lall Shaw Chowdhry*(1), *Azim-ullah v. Najm-un-Nissa*(2) and *Mahabir Singh v. Saira Bibi*(3) are distinguishable from the present case since in none of them was there a subsisting attachment entitling the plaintiff to sue under section 67. It appears from the District Munsif's judgment that the plaintiff offered to amend his plaint so as to enable the Court to pass the proper decree as indicated above. We think that this should have been allowed.

We, therefore, set aside the decrees of the Courts below and remand the suit to the District Munsif's Court for disposal according to law. If the stamp paid by the plaintiff is not sufficient for the plaint when amended, the extra stamp duty should be levied. Costs in this and in the lower Appellate Court will be costs in the suit.

(1) I.L.R., 21 Cal., 34.

(2) I.L.R., 16 All., 416.

(3) I.L.R., 17 All., 520.

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APPELLATE CIVIL—FULL BENCH.

*Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmania
Ayyar and Mr. Justice Benson.*

ANNAMALAI CHETTIAR (PLAINTIFF), APPELLANT,

v.

MALAYANDI APPAYA NAIK AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1905.
October
19, 24.
1906.
February 5,
6, 27.

Transfer of Property Act IV of 1882, s. 52.—The doctrine of lis pendens applies to cases in which decrees are passed on compromise—'Contentious suit or proceeding,' meaning of.

The doctrine of *lis pendens* as embodied in section 52 of the Transfer of Property Act applies to transfers effected during the pendency of a contentious suit or proceeding, even when such suit or proceeding is subsequently compromised and a decree passed in pursuance of such compromise, provided such compromise is not tainted by fraud or collusion.

The word 'contentious' is used in section 52 of the Transfer of Property Act in the sense in which it is used in Probate Practice and means the opposite of common form or voluntary business.

Vythinadayyan v. Subramania, (I.L.R., 12 Mad., 439), overruled.

Suit by the plaintiff (appellant) to recover from the first defendant personally, and by sale of the hypothecated properties the amount due on a hypothecation bond executed by the first defendant and his deceased father on the 11th November 1897 for Rs. 5,200. Defendants Nos. 2 and 3 are the undivided sons of the first defendant. The fourth defendant had purchased the properties hypothecated to the plaintiff in execution of a compromise decree in Original Suit No. 23 of 1897 passed in favour of the fourth defendant. Among other reliefs the plaintiff asked for a declaration that the sale to the fourth defendant was fraudulent and collusive and not binding on the plaintiff.

The further facts are stated in the order of reference to the Full Bench.

The Subordinate Judge upheld the sale in Original Suit No. 23 of 1897 and gave the plaintiff a simple money decree.

Plaintiff preferred this appeal.

The case came in the first instance before (Sir Arnold White, Chief Justice, and Subrahmania Ayyar, J.), who made the following

* Appeal No. 165 of 1902, presented against the decree of M.R.Ry. T. M. Rangaiahariar, Subordinate Judge of Madura (West), in Original Suit No. 45 of 1900.

ORDER OF REFERENCE TO A FULL BENCH.—The fourth defendant, the Commercial Bank, having advanced large sums of money to Appayasami Naicker, the Zamindar of Kannivadi, and his son, obtained on 14th December 1895, a registered agreement from them whereby *inter alia* it was provided that the Zamindar and his son were to execute to the Bank a mortgage on the terms and conditions stated in the agreement for the amount advanced and for any further sums that may in pursuance of the agreement be advanced. Pending the execution of the mortgage deed the Bank was put in possession of the property mortgaged, and it proceeded to collect the rents and dues and manage the property as stipulated in the agreement. Part of the property made security to the Bank, viz., a tract of land in one of the hill villages in the zamindari was at the time of the said agreement in the possession of Mr. Nicholson who had entered on it without right. A suit was brought by the Zamindar for the recovery of the land from Mr. Nicholson, the Bank also being a plaintiff. Possession was decreed on the 9th April 1896, and the decree, with the consent of the Bank, directed that the delivery of possession was to be to the Zamindar.

The Zamindar failed to execute the mortgage to the Bank and obstructed it from realising the rents, and otherwise interfered with its possession. The Bank thereupon on the 26th April 1897 instituted Original Suit No. 23 of 1897 on the file of the lower Court to enforce specific performance of the contract on the part of the Zamindar and to be secured in quiet and peaceable possession of the mortgaged property and the enjoyment of its rights in accordance with the terms of the mortgage to be executed by the Zamindar and his son. It prayed, in the alternative, that an account should be taken of all the moneys paid by the Bank under or by virtue of the said agreement, and of the moneys to which it would be entitled under or by virtue thereof had the mortgage referred to in the agreement been duly executed, that the Zamindar and his son should be directed to repay the same with interest thereon, and that, in default, the mortgaged property or a sufficient part thereof should be sold and the proceeds applied towards the discharge of the amount found due to the Bank. The alternative prayer was made with reference to express provisions in the agreement which created in favour of the Bank a charge for all moneys due to it in accordance with the agreement on the whole of the property to be included in the instrument of

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mortgage contemplated to be executed. Pending this suit by the Bank against the Zamindar and his son, the Zamindar transferred his right to the land covered by the decree against Mr. Nicholson, to the plaintiff in the present suit. After this, that is, on the 18th August 1898, the Bank's suit against the Zamindar was decreed. The decree was in pursuance of a compromise entered into between the Bank and the Zamindar. Under the compromise the Bank waived the claim to specific performance, the amount due by the Zamindar to the Bank was settled and fixed to be thirteen lakhs and fifteen thousand rupees and was made payable with interest on the 15th August 1900, and, in default, the mortgaged property, inclusive of the land transferred to the present plaintiff, was to be sold in execution. The Zamindar having failed to pay in accordance with the decree, the land referred to with the other properties made security by the decree was sold by order of Court and purchased by the Bank itself at the Court sale.

It was contended in the lower Court by the plaintiff that the compromise was fraudulent. It was urged there, as also before us, that the amount settled as due to the Bank was in excess of what was really due to it. But there is no foundation whatever for these contentions, and we are satisfied that the compromise was entered into *bonâ fide* and that the sum payable thereunder to the Bank was not in excess of what it was entitled to. The order for sale in default of payment on the date fixed was the appropriate relief that would have had to be granted with reference to the alternative prayer in the plaint and independently of the provision for such an order in the compromise.

One of the questions for determination in the present case is whether the transfer to the plaintiff pending the Bank's suit is subject to the decree and execution proceedings therein. That the Bank's suit had become contentious by service of notice on the defendants before the transfer to the plaintiff is undisputed. That the transfer was made during the active prosecution of such a suit is also undisputed. The only point about which the parties are at issue is whether the transfer was or was not affected by the decree, having regard to the circumstance that the decree was in pursuance of a compromise. According to *Vythinadayyan v. Subramania*(1), the question will have to be answered in the

negative. As, however, we entertain a doubt as to the soundness of the rule therein laid down on the point, we refer for the opinion of a Full Bench the question :—

Whether the transfer to the plaintiff was not subject to the decree and execution proceedings in Original Suit No. 23 of 1897 ?

The appeal came on for hearing in due course before the Full Bench constituted as above.

Sir V. Bhashyam Ayyangar and The Hon. Mr. P. S. Sivaswami Ayyar for appellant.

Mr. E. Norton and S. Srinivasa Ayyangar for fourth respondent.

The other respondents not appearing in person or by Council.

The Court expressed the following

OPINION (Sir ARNOLD WHITE, C.J.).—In this reference the question for determination is whether the doctrine of *lis pendens*, as embodied in section 52 of the Transfer of Property Act, applies when the suit during the pendency of which the transfer takes place is subsequently compromised and a decree is given in pursuance of the compromise; or, in other words, was the case of *Vythinadayyan v. Subramania*(1) rightly decided ?

Section 52 of the Transfer of Property Act is in these terms :—

“ During the active prosecution in any Court having authority “ in British India, or established beyond the limits of British India “ by the Governor-General in Council, of a contentious suit or “ proceeding in which any right to immoveable property is directly “ and specifically in question, the property cannot be transferred “ or otherwise dealt with by any party to the suit or proceeding “ so as to affect the rights of any other party thereto under any “ decree or order which may be made therein, except under the “ authority of the Court and on such terms as it may impose.”

In support of the view that the section did not apply in the case of a compromise decree, it was argued that the word ‘ contentious ’ was introduced for the express purpose of excluding the operation of the doctrine of *lis pendens* when the decree was a decree by consent. I find myself quite unable to accept this view. A suit is either contentious or non-contentious, and the fact that there is a decree by consent cannot by a sort of relation back alter the nature and character of the suit. The word contentious as distinguished from voluntary, or common form, is used to

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(1) I.L.R., 12 Mad., 439.

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describe the jurisdiction of the Courts whose powers were vested in the Court of Probate by the Probate Act, 1857. The expression "voluntary and contentious jurisdiction and authority" occurs in sections 3 and 4 of that Act, and the practice of the Probate Division is governed by rules which distinguish between contentious and non-contentious business. I think the word contentious is used in section 52 of the Transfer of Property Act in the sense in which it is used in the Probate Act and Rules.

If the nature of the suit or proceeding is such that no contest is involved—as in probate common form business—the suit or proceeding is non-contentious. If a contest is involved it is contentious. I am quite prepared to accept the definition adopted by the Calcutta High Court in *Upendra Chandra Singh v. Mohri Lal Marwari*(1). With reference to the authorities bearing upon the meaning of the words 'contentious suits' their Lordships say (p. 752) "what we think may be gathered from these cases, however, is that to constitute a suit 'contentious,' it must be a suit, which upon the face of the proceedings would appear to involve some contention as to the right of one or other of the parties in the immoveable property, which is claimed in the suit, and whether there is such a contention may be gathered from the plaint itself, or the defence of the defendant, when it is put in."

This definition is in accordance with the definition of 'contention' contained in the explanation to section 253 A of the Succession Act—"By 'contention' is understood the appearance of any one in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf, to oppose the proceeding." It may be said that the very fact that there is a compromise shows that the suit was originally contentious. Otherwise there would be nothing to compromise.

With all deference to the learned Judges who decided *Vythi-nadayyan v. Subramania*(2), I cannot agree with the view that a Court in giving a decree in pursuance of a compromise performs a ministerial and not a judicial function. A decree is none the less a decree as defined by the Code of Civil Procedure, because it is based on a compromise, and the legal effects of the decree contemplated by section 375 do not differ from the legal effects of a decree where the suit has been fought out to the end. The fact that a decree is given in accordance with the terms which have

been come to between the parties does not prevent the decree being the formal expression by the Court of an adjudication on a right claimed or a defence set up within the meaning of the definition. The test is not—has the Court exercised its mind in deciding the terms of the decree? If it were, a decree in pursuance of an award would not be 'decree.'

As regards the English authorities the principle on which the doctrine of *lis pendens* is based is laid down by Lord Cranworth in *Bellamy v. Sabine*(1). The Lord Chancellor observes:—(p. 578) "It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party."

"Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end." Lord Justice Turner in giving judgment in the same case observes:—(p. 584) "It is, as I think, a doctrine common to the Courts both of Law and of Equity, and rests, as I apprehend, upon this foundation—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo*, subject again to be defeated by the same course of proceeding." A general order of Lord Bacon of 1649 which is cited by the Lord Justice (p. 585) is in these terms:—"No decree bindeth any that cometh in *bonâ fide* by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor order; but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any colour

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(1) I.L.R., 31 Cal., 745.

(2) I.L.R., 12 Mad., 439.

(1) 1 De G. & J., 566.

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"of allowance or privity of the Court, there regularly the decree "bindeth."

I can find nothing in the judgments in *Bellamy v. Sabine*(1) which is the leading English case upon the subject, which suggests that the doctrine of *lis pendens* does not operate when the decree of the Court is a decree based upon a compromise.

On the other hand, our attention was called to the case of *Landon v. Morris*(2) where it was held that a decree taken *pro confesso* was binding on a purchaser who had entered into a contract after the filing of the bill. Our attention was also called to an old case reported in 2 Freeman—"Decree by consent, for a lease, or other personal estate, shall bind purchasers, otherwise, said the Lord Keeper, you will blow up the Court of Chancery" (see *Windham v. Windham*(3)). This report, however, is too meagre to be of any value. Moreover, it would appear that the decree was in connection with personal estate.

With regard to the Indian authorities in *Kailas Chandra Ghose v. Fulchand Jaharri*(4), there was a consent order and it was held the doctrine did not apply. The order by consent was of a very special character, being an order for the sale of property to provide funds for the payment of costs. Moreover the decision of the Appellate Court of which Sir Richard Couch was a member was based not on the ground of the order having been made by consent but on the ground that the defendant had notice of the plaintiff's claim (see pp. 489 and 490). It does not seem to me easy to reconcile Sir Richard Couch's judgment in this case with the principles of the doctrine of *lis pendens* as enunciated by Lord Cranworth. In a case which came before Sir Richard Couch three years later (*Raj Kishen Mookerjee v. Radha Madhub Holdar*(5)) where it was held that a purchaser under an execution was bound by a *lis pendens*, this decision was not referred to. In *Kishory Mohun Roy v. Mahomed Mujaffar Hossein*(6), there is no doubt an *obiter dictum* which is in favour of the view which was contended for by Sir Bhashyam Ayyangar, viz., that the doctrine did not apply in the case of a compromise decree. In *Upendra Chandra Singh v. Mohri Lal Marwari*(7), the suits which were held to

(1) De G. & J., 566.

(2) 2 L.J. Ch., 35 (more fully reported 5 Sim., 247).

(3) 22 Eng. Rep., 1108.

(5) 21 W.R., 349.

(7) I.L.R., 31 Calc., 745.

(4) 8 B.L.R., 474.

(6) I.L.R., 18 Calc., 188.

be not 'contentious' within the meaning of section 52 were undefended suits for moneys due on mortgages by sale of the properties, in which no question as to the right to the properties was involved.

I think section 52 of the Transfer of Property Act should be construed as applying to the case of a compromise decree in the absence, of course, of anything in the nature of fraud or collusion. This seems to be the natural construction of the section and it is in accordance with the principles on which the doctrine of *lis pendens* is based.

With all respect I think the case of *Vythinadayyan v. Subramania*(1) was wrongly decided and I am of opinion that the answer to the question referred to us should be that the transfer to the plaintiff was subject to the decree and execution proceedings in Original Suit No. 23 of 1897.

SUBRAHMANIA AYYAR, J.—I am also of the same opinion. Of course the words "under any decree or order made therein" in section 52 of the Transfer of Property Act upon their face lend no support to the argument of Sir V. Bhashyam Ayyangar on behalf of the appellant, that the fact of the Bank's decree having been passed on a compromise renders it unavailing as against him. But the argument was put thus: the word 'therein' after "decree or order" in the section refers back to the words "contentious suit or proceeding" and though in the present instance the suit was contentious up to the time the compromise was entered into, it ceased to be such when that was concluded; consequently the decree in question was not a decree of the description contemplated by the section. The argument of course assumes that the phrase "contentious suit or proceeding" in the section covers only a suit or proceeding in which the parties are actually disputing and that only so long as the actual contest continues. In my opinion the word 'contentious' is employed in quite a different sense, viz., that in which Blackstone uses it in the passage cited in the recent New English Dictionary by Dr. Murray, that passage runs:—I pass by such Ecclesiastical Courts, as have only what is called a voluntary and not a contentious jurisdiction; which are merely concerned in doing or selling what no one opposes, and which keep an open office for that purpose (as granting dispensations, licenses, faculties and other remnants of the papal extortions), but

(1) I.L.R., 12 Mad., 439.

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do not concern themselves with administering redress to any injury [Blackstone's 'Commentaries,' VI edn. (1774), Vol. III, p. 66]. The contentious jurisdiction here spoken of is obviously that by invoking which a party having a difference with another puts the law in motion as against his adversary, in contradistinction to jurisdiction to be resorted to in matters which *ex hypothesi* admit of no opposition. The same idea is conveyed in Stroude's 'Judicial Dictionary' when the author in explaining the term 'contentious' observes that contentious business is the opposite of common form business. This interpretation is also in conformity with the opinion of Dr. Ghose who in his learned work on mortgages points out that the term "contentious proceeding" in the section has been borrowed from Probate Practice; where of course it merely means a proceeding in which there are adversary parties (III edn., p. 794). The unsoundness of the other view will be clearly seen if the startling consequence involved in it is borne in mind, for, according to Sir V. Bhashyam Ayyangar a decree passed *ex parte*, or on confession, or as the result of the defendant abandoning a defence set up would, equally with a compromise decree, not avail the successful party as against a transferee *pendente lite* from the defendant. This is virtually to abolish the salutary doctrine of *lis pendens* completely, inasmuch as a defendant desirous of defeating the plaintiff, however good his title may be, has only to transfer the property in litigation to a third party and abstain from doing anything in the suit. The essence of the doctrine of *lis pendens* undoubtedly is that where a proceeding before a Court exercising contentious jurisdiction is honestly brought to a termination in one of the modes which the law permits it to be terminated by and a decision of the Court is obtained, such decision is binding upon all persons who claim title by virtue of a transfer pending the litigation. With reference to this underlying principle there is no conceivable reason for attaching greater efficacy to a decision arrived at after actual contest than to decisions arrived at otherwise.

Passing to the authorities the only decision which conflicts with the view we are now taking is *Vythinadayyan v. Subramania*(1), decided by the late Chief Justice and Parker, J. At page 442 of the report the words "decision of the Court" are italicised, it being apparently thereby implied that a decree in pursuance of a

(1) I.L.R., 12 Mad., 439.

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compromise is not a decision by the Court for the purposes of *lis pendens*. This, as appears from what follows in the judgment, is obviously due to the effect ascribed by the learned Judges to *Jenkins v. Robertson*(1) which seems to have been taken as a decision on the general law. That this is not so was pointed out in *In re South American and Mexican Co.*(2), where it was laid down that a judgment by consent or default is as effective as an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case (see at pp. 45 and 46). In *Kailas Chandra Ghose v. Fulchand Jaharri*(3), also cited by the learned Judges all that was laid down was that there was no authority for the proposition that a transferee pending litigation who does not become a party to the proceeding is bound by *any order whatsoever* passed therein without reference to what would in the usual course take place having regard to the nature of the suit, the case set up in the plaint and the relief prayed for. In the course of his judgment Sir Richard Couch expressly abstains from entering into a consideration of the other effects of *lis pendens*. It is therefore difficult to see how anything in that case supports the view that the determination of the precise dispute in a case, in pursuance of a compromise, is for that reason any the less a decision by the Court. Be this as it may (*Kailas Chandra Ghose v. Fulchand Jaharri*(3)) does not seem to be altogether reconcileable with the two other decisions of the same High Court to which the attention of Collins, C.J., and Parker, J., was not drawn. They are *Naduroonissa Bebee v. Aghur Ali*(4), an earlier decision and *Raj Kishen Mookerjee v. Radha Madhub Holdar*(5), decided after *Kailas Chandra Ghose v. Fulchand Jaharri*(3), and in both of them compromise decrees were held to bind transferees *pendente lite*. The judgment in the second of these cases, where the doctrine of *lis pendens* was exhaustively examined, was delivered by Sir Richard Couch himself and the conclusion arrived at by him received the complete concurrence of the Judicial Committee in *Radha Madhub Holdar v. Monohur Mukerjee*(6). Nor is it to be supposed, as Sir V. Bhashyam Ayyangar suggested, that English reports furnish no instance of a decision not following an actual contest, having been held binding on transferees from parties to pending proceedings.

(1) L.R., 1 H.L.Sc., 117.

(3) 8 B.L.R., 474.

(5) 21 W.R., 349.

(2) (1895), 1 Ch., 37.

(4) 7 S.W.R., 102.

(6) I.L.R., 15 Cal., 756 at p. 761.

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Landon v. Morris(1) cited for the Bank is one such instance. And *Partridge v. Shepard*(2), *Turner v. Babb*(3) and *McIlwraith v. Hollander*(4) are American authorities in all of which the Courts held that compromise decrees prevailed as against purchasers *pendente lite* ('American Digest,' Century edition, Vol. 33, col. 1443, *a, d* and *e*).

Clearly therefore the answer to the question proposed must be in the affirmative.

BENSON, J.—I am also of the same opinion. At the time when the plaintiff obtained his interest in the property the suit (Original Suit No. 23 of 1897) was undoubtedly contentious, and was being actively prosecuted. Section 52 of the Transfer of Property Act therefore applies, and in the words of that section the property could not be transferred by any party to the suit (*i.e.*, by the Zamindar then a defendant) so as to affect the rights of any other party thereto (*i.e.*, the Bank then a plaintiff) under any decree which might be made therein, except under the authority of the Court. It is difficult to see how the compromise of the suit between the parties subsequent to the transfer can be held to render the suit non-contentious at the time of the transfer or, indeed, at any time. The very fact of the compromise shows that the suit was contentious. Moreover, if the compromise of a suit were held to render it non-contentious, it would never be safe for any party to enter into a compromise, since by so doing he would jeopardise the fruits of his decree, which might be made of no effect by a transfer made behind his back by the other party. I can find no reason why the law should be such as to involve consequences so completely at variance with the principles on which the doctrine of *lis pendens* is based. I have no doubt that the case of *Vythinadayyan v. Subramania*(5) was wrongly decided as shown in the judgments of my learned brothers.

The case came on for final hearing in due course before (Sir Arnold White, Chief Justice, and Subrahmania Ayyar, J.) when the Court delivered the following judgment.

JUDGMENT.—In accordance with the opinion of the Full Bench the appeal fails and is dismissed with costs.

(1) 2 L.J., Ch. 35; 5 Sim. Rep. in Ch., 247.

(2) 71 Cal., 470.

(4) 72 Mo., 105; (S.O.) 89, Am. Rep., 484.

(3) 60 Mo., 342.

(5) I.L.R., 12 Mad., 439.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Benson.

SRI RAJAH VENKATA NARASIMHA APPA ROW (SECOND PLAINTIFF), APPELLANT IN APPEAL SUIT No. 122 OF 1900,

v.

SRI RAJAH RANGAYYA APPA ROW AND OTHERS (THIRD PLAINTIFF, SECOND DEFENDANT AND FIRST DEFENDANT'S REPRESENTATIVES), RESPONDENTS IN APPEAL SUIT No. 122 OF 1900.

SRI RAJAH RANGAYYA APPA ROW (THIRD PLAINTIFF), APPELLANT IN APPEAL SUIT No. 123 OF 1900,

v.

SRI RAJAH VENKATA NARASIMHA APPA ROW AND OTHERS (SECOND PLAINTIFF, FIRST DEFENDANT'S REPRESENTATIVES AND SECOND DEFENDANT), RESPONDENTS IN APPEAL SUIT No. 123 OF 1900.

SRI RAJAH RANGAYYA APPA ROW (FIRST DEFENDANT), APPELLANT IN APPEAL SUIT No. 32 OF 1904,

v.

SRI RAJAH PARTHASARADHI APPA ROW AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS IN APPEAL SUIT No. 32 OF 1904.

SRI RAJAH PARTHASARADHI APPA ROW (PLAINTIFF), APPELLANT IN APPEAL SUIT No. 41 OF 1904,

v.

SRI RAJAH RANGAYYA APPA ROW AND ANOTHER (DEFENDANTS), RESPONDENTS IN APPEAL SUIT No. 41 OF 1904.*

Hindu Law—Character of descendibility not affected by forfeiture and re-grant to heirs
—Adoption—Authority given jointly to two widows to adopt, valid, and can be exercised by one after the death of the other—Adoption made under coercion only voidable—Adoption does not divest adopted son of joint property of which he had become sole and absolute owner.

The question whether an estate is subject to the ordinary Hindu Law of succession or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it.

* Appeal Nos. 122 and 123 of 1900, presented against the decree of M.R.Ry. P. S. Gurumurti Ayyar, Subordinate Judge of Kistna at Masulipatam, in Original Suit No. 35 of 1895;

Appeal Nos. 32 and 41 of 1904, presented against the decree of District Court of Godavari, in Original Suit No. 44 of 1899.

1905.
July 24, 28,
31.
August 1, 4,
7, 11, 15, 18.
September
25, 27, 29.
October 2, 5,
9, 13, 16.
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Srimantu Raja Yarlagadda Mallikarjuna v. Srimantu Raja Yarlagadda Durga, (L.R., 17 I.A., 134 at p. 144), referred to and followed.

Where an estate acquired by sale or forfeiture by Government is regranted to the heirs of the former owner without expressing any intention to interfere with the quality of the estate in regard to its descendibility, such regrant does not affect that quality of the estate, although it would be self-acquired property in the hands of the grantee and would devolve as such:

Held, on the evidence and the previous history of the Nidadavole estate that such estate was partible according to the ordinary Hindu Law applicable to coparcenary property.

An authority to adopt given to two widows jointly is not invalid and may be exercised by one after the death of the other.

An adoption made under coercion is not void, but voidable, and will be valid if ratified subsequently if no one's interest is prejudicially affected by such ratification before it is made.

The adoption into another family of the only surviving member of a joint family in whom the family estate has vested solely and absolutely does not in law operate to divest him of his rights in such estate.

The facts necessary for this report are fully set out in the judgment.

Sir *V. Bhashyam Ayyangar*, *N. Subba Rau*, The Hon. Mr. *P. S. Sivaswami Ayyar*, *S. Gopalaswami Ayyangar*, *C. R. Tiruvenkatachariar*, The Hon. Mr. *L. A. Govindaraghavaiyar* and *M. Kunjunni Nair* for appellant in Appeal Suit No. 41 of 1904.

Mr. *E. Norton*, *V. Krishnaswami Ayyar*, *P. R. Sundaraiyar*, *K. Srinivasaiyyangar*, *K. N. Aiya*, *K. Subrahmania Sastri* and *A. Nilakantaiyar* for first respondent in Appeal Suit No. 41 of 1904.

T. V. Seshagiri Ayyar, *P. Nagabhushanam* and *T. V. Muthukrishnaiyar* for second respondent in Appeal Suit No. 41 of 1904.

V. Krishnaswami Ayyar, *P. R. Sundaraiyar*, *K. Srinivasaiyyangar*, *K. N. Aiya*, *K. Subrahmania Sastri* and *A. Nilakantaiyar* for appellant in Appeal Suit No. 32 of 1904.

Sir *V. Bhashyam Ayyangar*, *N. Subba Rau*, The Hon. Mr. *P. S. Sivaswami Ayyar*, *S. Gopalaswami Ayyangar*, *C. R. Tiruvenkatachariar*, The Hon. Mr. *L. A. Govindaraghavaiyar*, *S. Srinivasaiyyangar* and *M. Kunjunni Nair* for first respondent in Appeal Suit No. 32 of 1904.

T. V. Seshagiri Ayyar and *T. V. Muthukrishnaiyar* for second respondent in Appeal Suit No. 32 of 1904.

T. V. Seshagiri Ayyar, *P. Nagabhushanam* and *T. V. Muthukrishnaiyar* for appellant in Appeal Suit No. 122 of 1900.

Sir *V. Bhashyam Ayyangar*, *N. Subba Rao*, The Hon. Mr. *P. S. Sivaswami Ayyar*, *S. Gopalaswami Ayyangar* and *C. R. Tiruvenkatachariar* for third respondent in Appeal Suit No. 122 of 1900.

V. Krishnaswami Ayyar and *P. R. Sundaraiyar* for first respondent in Appeal Suit No. 122 of 1900.

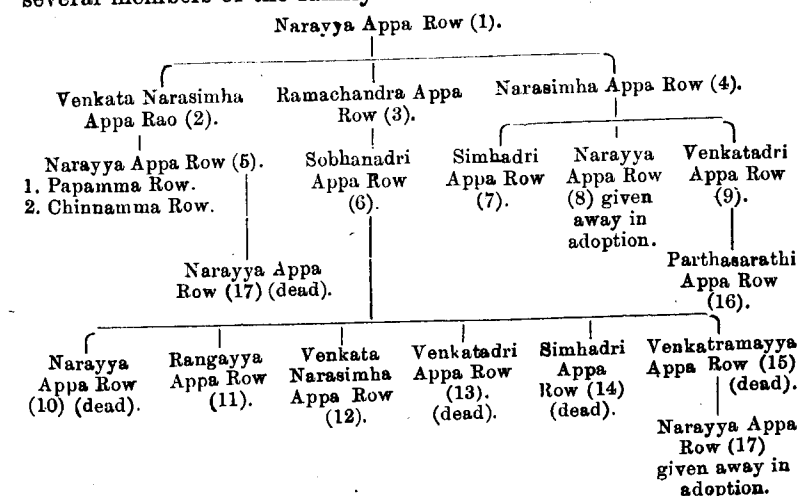
V. Krishnaswami Ayyar, *P. R. Sundaraiyar* and *K. Subrahmania Sastri* for appellant in Appeal Suit No. 123 of 1900.

Sir *V. Bhashyam Ayyangar*, *N. Subba Rau*, The Hon. Mr. *P. S. Sivaswami Ayyar*, *S. Gopalaswami Ayyangar* and *C. R. Tiruvenkatachariar* for third respondent in Appeal Suit No. 123 of 1900.

T. V. Seshagiri Ayyar, *P. Nagabhushanam* and *T. V. Muthukrishnaiyar* for first respondent in Appeal Suit No. 129 of 1900.

JUDGMENT.—These appeals, and the suits out of which they arise, relate to the right to the permanently-settled estates of Nidadavole and Medur in the Kistna and Godavari districts.

The following genealogical tree shows the relationship of the several members of the family:—



The three brothers, Venkatanarasimha (2), Ramachandra (3) and Narasimha (4) were divided. The last admitted male owner of Nidadavole estate was Narayya Appa Row (5) who died in 1864, leaving behind him as his only heirs two widows, Papamma Row and Chinamma Row. These widows put forward a will by their deceased husband, executed on the day before his death, which provided for the equal division of his estate between them, and authorized them to adopt a son to him. They continued in joint possession and enjoyment of the estate until the death of Chinamma Row in 1881 or 1883, after which Papamma Row alone enjoyed the estate. In 1888 Venkataramayya (15), who was the sole owner of the Medur estate, died

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and the Court of Wards then took possession of the estate on behalf of Venkataramayya's only son, Narayya (17) who was then a child. In 1890 Papamma Row adopted this Narayya who was then sole owner of the Medur estate. The minor, Narayya, died unmarried in August 1895, his sole heir being his adoptive mother Papamma Row. It was immediately after this that the first of the suits now before us, viz., Original Suit No. 35 of 1895, was filed before the Subordinate Judge of Masulipatam by Venkayamma, the natural mother of the minor Narayya, against Papamma Row and the Court of Wards. In this suit she sought to recover possession of the Medur estate on the ground that the adoption of Narayya by Papamma Row was invalid for various reasons, and that, even if it was not invalid, Narayya, by being adopted, was divested of all interest in the Medur estate. While this suit was pending Venkayamma died, but the suit was continued by Rangayya (11) and Venkatanarasimha (12) as the reversionary heirs of her late husband, Venkataramayya (15), who was also their own divided brother. In that suit the Subordinate Judge held that the will of Narayya (5) under the authority of which Papamma Row made the adoption, was genuine, and that the adoption of the minor Narayya (17) was not invalid for any reason, and also that it did not operate to divest Narayya (17) of the estate of Medur, which therefore passed on his death to Papamma Row, as his adoptive mother. He (the Subordinate Judge) therefore dismissed the suit on the 2nd December 1899. It is against this decree that Venkatanarasimha (12) and Rangayya (11) have respectively filed the present Appeals Nos. 122 and 123 of 1900. Three days after that decree was passed, i.e., on the 5th December 1899, Papamma Row died and on the 14th of the same month the second of the suits now before us, viz., Original Suit No. 44 of 1899, was launched before the District Judge by Parthasarathi (16). It will be seen by a reference to the genealogical tree that this Parthasarathi (16) and Rangayya (11) and Venkatanarasimha (12) are all equally nearly related to Narayya (5), the late husband of Papamma Row, and they were, in fact, his only reversionary heirs when Papamma Row died. They were also the only reversionary heirs of the minor Narayya (17) considered as the adopted son of Narayya (5) and of Papamma Row and they were all equally nearly related to him. Parthasarathi in his

suit (Original Suit No. 44) therefore claimed, as a reversioner, to be entitled to a one-third share in the estates of Nidadavole and Medur, Rangayya and Venkatanarasimha being also each entitled to a one-third share, and he sued to recover his share from them as they had taken possession of the estates on Papamma Row's death. It will further be seen by reference to the genealogical tree that the nearest reversioners of the minor Narayya (17), considered as a member of his natural family, were his father's brothers, Rangayya (11) and Venkatanarasimha (12) and that Parthasarathi (16) was only a distant reversioner. If, therefore, the adoption of the minor Narayya (17) by Papamma Row was invalid, or if that adoption operated in law to divest the minor of the Medur estate, both of which contentions, however, Parthasarathi (16) denied, then Parthasarathi could have no right as a reversioner to a share in that estate. He, therefore, prayed that if either of those contentions were established, he might be decreed his one-third share in Nidadavole alone.

The main contentions of the defendants Rangayya (11) and Venkatanarasimha (12) were that the will of Narayya (5) was a forgery, and that for this and other reasons the adoption of Narayya (17) by Papamma Row was invalid, and that, even if valid, it operated to divest Narayya (17) of the Medur estate to which therefore Parthasarathi could have no claim. Rangayya also contended that Nidadavole was an impartible estate and also contended that Nidadavole was an impartible estate and descended to him alone under the rule of primogeniture, as he was the senior of the reversioners of the last male owner, whether that owner were Narayya (5) or Narayya (17), and also that if Narayya (17) brought the estate of Medur with him into the Nidadavole family by virtue of his adoption, it became impressed with the character of impartibility and therefore passed to him alone along with Nidadavole.

The District Judge found against Rangayya's pleas founded on the alleged impartibility of Nidadavole; but he found that the alleged Will of Narayya (5) was a forgery, and that for this and various other reasons the adoption of Narayya (17) by Papamma Row was invalid. He, therefore, dismissed Parthasarathi's suit so far as the Medur estate was concerned, but gave him and second defendant [Venkatanarasimha (12)] each a decree for a one-third share of the Nidadavole estate.

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It is against this decree that Parthasarathi and Rangayya respectively have brought the present Appeals Nos. 41 and 32 of 1904.

Counsel for the appellant in Appeal No. 41 requested that that Appeal and No. 32 might be tried separately from Appeals Nos. 122 and 123 of 1900, but it seems to us more convenient to deal with all four appeals in one judgment.

The main questions, then, which arise for decision are whether the Nidadavole estate is impartible, or follows the ordinary Hindu Law which governs the descent of partible estates; and whether the adoption of Narayya (17) is invalid. This latter question depends mainly on whether the will of Narayya (5) is genuine or not, whether it was a sufficient authority to Papamma Row to make the adoption, and whether the adoption is invalid by reason of Papamma Row having been coerced into making it by a threat of being criminally prosecuted if she did not do so.

[Their Lordships proceeded to state the history of the previous litigation regarding the estates.]

As observed by Sir Richard Couch in the case of *Srimantu Raja Yarlagadda Mallikarjuna v. Srimantu Raja Yarlagadda Durga* (1), "the question whether an estate is subject to the ordinary Hindu Law of succession, or descends according to the rule of primogeniture must be decided in each case according to the evidence given in it." This rule was lately re-affirmed by the Privy Council in the *Udayarpalliam* case (2).

[Their Lordships then discussed the history and origin of the Nidadavole estate.]

It has been argued that there was no forfeiture in this case, but only the removal of one member of the family for misconduct, and the substitution of another; and in support of this view reliance is placed upon the *Ramnad* case (3). It is clear, however, from exhibits 214 and 20 that it was a complete forfeiture, and that Government considered itself free to convert the estate into Havelly, that is, ordinary Government lands, and that it was re-granted to the son purely as an act of grace. In the previous litigation the Courts (including the Privy Council) have always

(1) L.R., 17 I.A., 134 at p. 144.

(2) I.L.R., 28 Mad., 508.

(3) I.L.R., 24 Mad., 629.

referred to this transaction as a forfeiture for rebellion, and we see no reason to take any other view of its character. In making the re-grant, however, to his son the Government did not express any intention to interfere with the quality of the estate in regard to its descendibility to heirs. We take it that, in accordance with the principle laid down in the *Hansapur* case (*Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee* (1)), and affirmed in the *Sivaganga* case (*Muttu Vaduganadha Tevar v. Dora Singha Tevar* (2)), the re-grant would not operate to render it partible if it was previously impartible and descendible to a single heir. It, no doubt, rendered the estate the self-acquisition of the new grantee, but that would not destroy its character of impartibility if it possessed that character before the forfeiture (*Sivaganga* case, page 308). On the other hand if the estate was partible, as we find it was in the present case, there is nothing in the forfeiture and re-grant to affect that quality of the estate. The only effect would be that it would devolve as self-acquired, not as ancestral, property. There is nothing in the sanad or in the correspondence at the time to suggest that Government recognized the estate as an impartible one, or gave it to the grantee with special advertence to the fact that he was the eldest son of his father.

[Their Lordships then considered the evidence as to the descendibility of the estate at great length.]

We find that the estate is not impartible and descendible to a single heir, but is partible according to the ordinary Hindu Law applicable to coparcenary property.

The next question that arises for decision is whether the will of Narayya (5) is genuine or not.

[Their Lordships discussed, at length, the evidence regarding the execution of the will.]

Looking to all the evidence in the case and the conduct of the various persons interested we have no hesitation in finding that the will of 1864 is genuine.

The authenticity of the will being thus established, it follows that the authority given in it to the widows to adopt is proved. It is then contended on behalf of the defendants that that authority was in itself invalid, because it was a power granted jointly to

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(1) 12 M.L.A., 1 at p. 33.

(2) I.L.R., 3 Mad., 290.

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the two widows, whereas it was decided in the Uthumalai case, *Annapurni Nachiar v. Forbes* (1), that only one widow can make an adoption and therefore an authority given to two must be illegal.

To begin with there is no such ruling in the case referred to. All that their Lordships have done is to notice with approval a Bengal case where three widows having been authorized to make an adoption it was held that only one could take the given son in adoption so as to constitute herself the mother. But so far from the authority given to more than one widow to adopt being held *ipso facto* invalid, the adoption that was actually made in that case by one of the three widows under that authority was not disputed which it must have been if the authority to adopt was itself illegal. There is, therefore, no ground for this contention.

The next contention is that the authority in this case being to the two widows jointly could not be exercised after the death of one by the surviving widow. There is no warrant for this proposition in the will itself. It is true that no provision is made as to what is to happen if one widow dies, no adoption having been made during her lifetime. But there is no prohibition that one widow alone should not adopt after the death of the other. During the lifetime of both it might well be urged that both should combine in making the adoption. But that is no ground for holding that, when one had died, the authority given to both widows was exhausted and did not remain with the survivor. The intention of the testator clearly was that the widows should enjoy the estate so long as they liked. He required no immediate adoption, which would have ousted the widows from the enjoyment of the estate. But he leaves it to them to select their own time for making the adoption for the continuation of his line. He was, of course, anxious that, for this purpose, an adoption should ultimately be made. But this very object would have been defeated if, after the death of one widow, the other was not to exercise the power. We should not impose limits and conditions on a power which the giver of the power has not himself imposed either expressly or impliedly. A Hindu can authorize no one but his widow or widows to make an adoption. He cannot nominate any one else. He, in fact, has no choice in the matter. So that

(1) I.L.R., 23 Mad., 1.

the authority given to the widows here, could have been given to them in no other capacity than that they were his widows. It was by virtue of their *status* or position as widows that the authority was conferred, and the giving of the authority to both widows without any restrictions is tantamount to giving authority to each. The case is analogous to that of a power given to a person not in his individual capacity, but as holding a particular office such as that of an executor. And in such a case the law is that the power conferred on two is not extinguished by the death of one. The fact that the widows had a right of survivorship in regard to the property is a further good argument that the survivor of them also had the right under the husband's authority to appoint an heir to that property. This disposes of the second objection, and we hold that Papamma Row had full power to make an adoption after the death of her co-widow, Chinnamma Row.

The defendants next seek to set aside the adoption of the Medur minor, not on the ground that all due essentials and formalities were not observed in making it, but on the ground that Papamma Row and the Medur Rani were both coerced into making it, and it was therefore void.

To deal with Papamma Row's case first: The evidence is overwhelming that her consent to take the Medur minor in adoption, at the time she did, was extorted from her by a threat of criminal prosecution for the forgery of a will executed in her favour by Venkataramaya (15), the natural father of the Medur minor, whom she had at first adopted but whose adoption was afterwards set aside by the Courts as invalid. The author of this threat was one Mr. P. Subrahmanya Aiyar, an attorney, now deceased, specially employed by the Court of Wards for taking action against Papamma Row in respect to her possession of the Nidadavole estate.

[Their Lordships considered the evidence regarding coercion and the circumstances under which Papamma Row's consent to the adoption was obtained.]

That establishes the case set up that Papamma Row was coerced according to the definition of 'coercion' in the Indian Contract Act, into making the adoption, the 'coercion' here being 'criminal intimidation' as defined in section 503 of the Indian Penal Code.

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Now the question arises whether this coercion avoids the arrangement or only makes it voidable. No authority is quoted to us showing that under the 'Hindu Law' an adoption made under coercion is *ipso facto* void, and under the Law of Contracts it is only voidable. Papamma Row lived for many years after this adoption, but so far from ever seeking to set it aside, it is clearly shown, and indeed it is admitted, that she fully agreed to it and ratified it in every way she could, and for years her chief anxiety was to maintain and establish it as a valid adoption. As no one's interest was prejudicially affected by this subsequent ratification before it was made the adoption must be held to stand good.

It was urged for Rangayya (11) and Venkata Narasimha (12) that it was the stifling of a criminal prosecution that led to Papamma Row's consent and such a consideration is opposed to public policy and the adoption is thereby rendered void. There is no doubt that if such had been the case the agreement would be void. But we are unable to say that there was any stifling of a public prosecution, in other words, any compounding of a felony, for the simple reason that no felony had been committed and no prosecution had been started on the footing that a felony had been committed. All the ceremonies proper to a valid adoption were admittedly performed, and the conclusion we come to is that though the coercion to which Papamma Row was subjected might have justified her in repudiating the adoption, yet as she did not repudiate it, but always maintained its validity, the coercion does not render it invalid.

As to the alleged coercion of the Medur Rani, only a few words need be said. We find that great pressure was brought to bear upon her to give her infant son in adoption. Her sole objection, however, was that the child would be taken away from her. But when it was arranged that she should retain the custody of the child, she appears to have readily consented to give him in adoption, as it was greatly to his material advantage to be so given. So that, as regards her, there was nothing to vitiate the adoption. In conclusion we accordingly decide that the adoption was good and valid.

The adoption of Narayya (17) by Papamma Row being valid, it is next necessary to consider what was the effect of that adoption as regards the Medur estate. That estate was obtained by

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Narayya's father, Venkataramayya (15), by a partition which he made with his brothers before Narayya's birth. On his birth Narayya became a co-sharer with his father in that estate. They were the only members of the joint family to which the estate belonged. Venkataramayya subsequently died, and then Narayya became the last surviving male member of the family. Under the Mitakshara law, which governs the parties, the Medur estate then vested in Narayya solely and exclusively, though his mother, Venkayamma, could claim maintenance from it. This was the state of things when Narayya was adopted by Papamma, and the question in dispute is whether Narayya continued to be the owner of the estate notwithstanding his adoption, or whether he was divested of that property by reason of his being adopted into another family. There is no question but that when one of several coparceners leaves his natural family by being adopted into another family he at once loses all his rights in the coparcenary property, and he cannot thereafter claim to inherit or succeed to any property by virtue of his relationships in his natural family. It is also conceded, on the other hand, that if he were possessed of any self-acquired property at the time of adoption, his right to it would be unaffected by the adoption. But the case with which we have to deal is one midway between these two. The Medur estate was not the self-acquired property of Narayya, nor was it, at the time of adoption, coparcenary property in which any other person had a share. It was ancestral partible property which vested solely and absolutely in him because he was the only surviving member of the joint family to which it previously belonged.

We are aware of only one case in which the question has been actually decided, and that it is the case of *Behari Lal Laha v. Kailas Chunder Laha* (1).

There Mr. Justice Amir Ali held that although "adoption prior to the vesting of the inheritance entails loss of the right of claiming any share in the estate of the adopted person's natural father or natural relations, yet the interest which is once vested in a son upon the death of a father is not divested by his subsequent adoption into another family."

(1) 1 C.W.N., 121.

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It is, however, contended by some of the parties to the present suits that this view of the law is incorrect, and it is therefore necessary to examine the texts of Hindu Law which refer to the matter. It must be admitted that they are by no means explicit, but we are of opinion that they do not require us to dissent from the view of the Calcutta High Court just quoted, and that we would not be justified in holding that a person adopted loses, thereby, any rights of which he is not clearly deprived by the terms of the law to which he is subject.

The texts of *Manu* which refer to the matter are verses 141 and 142 of chapter IX and are translated as follows by Buhler at page 355 of volume XXV of the 'Sacred Books of the East' edited by Max Muller:—

"141. Of the man who has an adopted (Dattima) son possessing all good qualities, that same (son) shall take the inheritance, though brought from another family.

"142. An adopted son shall never take the family (name) and the estate of his natural father; the funeral cake follows the family (name) and the estate, the funeral offerings of him who gives (his son in adoption) cease (as far as that son is concerned)."

The texts of *Manu* are to be understood in the sense in which they are interpreted by the Hindu Commentators of recognized authority. The above text is quoted in the *Mitakshara*, chapter I, section II, verse 32, and is thus translated at page 422 of Stokes' 'Hindu Law Books'—"A given son must never claim the family and estate of his natural father. The funeral oblation follows the family and estate, but of him who has given away his son, the obsequies fail."

In the *Dattaka Chandrika* (Stokes' *idem*, page 640), the reference is as follows:—

"On the subject (of adoption) *Manu* says:—

"A given son must never claim the family and estate of his natural father. The funeral cake follows the family and estate: but of him who has given away his son the obsequies fail."

"It is declared by this, that through the extinction of his filial relation from gift alone, the property of the son given in the estate of the giver ceases; and his relation to the family of that person is annulled.

"And accordingly since extinction of relation to the family (of the natural father) and so forth is shown, and as a text 'recites—let the father initiate his own sons,—the initiatory rites even of the adoption, which are yet to be completed subsequent to adoption, are to be performed by the adopter; but those already performed by the natural father are not to be cancelled.'"

Again Madhavya's Commentary, as translated by Dr. Burnell (page 24, *Dayavibhaga*), says "Dattaka sons do not share in the wealth of their natural father. Thus *Manu* says:—A Dattima son may never share in the family or property of his natural father; the pinda follows the family and estate: the funeral offering departs from the giver (of a son)."

They are the principal ancient commentators of special authority in South India. The *Dattaka Mimamsa*, which is of special authority in Bengal, follows the interpretation given in the *Dattaka Chandrika*. See Stokes' *idem*, page 599. The same passage of *Manu* is referred to in the *Mayukha* (of special authority in Bombay) as follows:—"Therefore says *Manu* (chapter IX, v. 242): 'A given son shall never claim the family and estate of his natural father; the pinda (the obsequial oblation) which follows the family and the heritage, and the *Shraddha* and other funeral ceremonies of the giver cease.' " *Gotra rikthamujah* (means) what goes along with the family and the inheritance, the two expressions being generally co-extensive " (*Mandlik's 'Hindu Law,'* page 59).

We do not think that there is anything in these passages which necessarily carries with it the idea that the adopted son is divested of property which is his own absolutely at the time of adoption. The more correct view seems to be that by the adoption the filial relationship, as the author of the *Chandrika* says, is extinguished in one family and is created in the other family, and that thereafter the person adopted cannot claim or take any property in his natural family by virtue of the extinguished filial relationship therein. The fact that under the *Dayabhaga* law in force in Bengal a son has no vested coparcenary interest with his father in ancestral property and that his interest in ancestral property of the father only accrues on the father's death rather favours the view that *Mimamsa* when adopting the interpretation of the *Chandrika*

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had in mind the loss of rights that might accrue after the date of adoption rather than rights to property which had already vested.

In the case of *Moniram Kolita v. Keri Kolitami* (1), the Privy Council referred to "what appears to be the general rule of Hindu Law that an estate once vested by succession or inheritance is not divested by any act or incapacity which before succession would have formed a ground for exclusion from inheritance" and held that it had not been established that a widow's estate formed an exception to that rule so that she should be divested of it by unchastity after it had vested in her. In the present case we must hold that it has not been established that an ancestral estate which has become vested in a person wholly and absolutely prior to his adoption is divested by reason of the adoption. We think that the general rule of Hindu Law referred to by the Privy Council applies to this case, and that we would not be justified in imposing a disability on an adopted son which is not clearly imposed by the Hindu Law. The vakil for the Modur reversioners, however, relies strongly on the opinion expressed by Mr. Sarkar at pages 119, 120 of his Hindu Law, second edition, published in 1903, in which he lays down the principle that adoption operates as the civil death of the person adopted in his natural family, and as a re-birth in his adoptive family, and he, therefore, holds that on adoption the succession opens to all the property possessed at the time by the person adopted. This view is directly opposed to Mr. Sarkar's earlier view as stated in his Tagore Lectures on adoption, 1888, published in 1891 (pages 389, 390) in which he states "that according to the Mitakshara Law, a son acquires by birth "a right to the ancestral property in the possession of the father, "and an undivided coparcenary interest is vested in him as a "member of the family corporation. The vesting, however, is "imperfect as the interest is liable to variation and also to "extinction by reason of any subsequent disqualification. The "interest is acquired in the character of a member of the family, "and when that character is lost by adoption, the interest also "ceases. In this way you may explain as to how a Mitakshara "son on being given away by his father in adoption loses his "vested interest in the ancestral property.

(1) I.L.R., 5 Cal., 776 at p. 788.

"But the question assumes a different shape when the boy is "full owner of any property such as what was inherited by him "from his maternal grandfather or uncle before adoption. There "appears to be no reason why a child given in adoption should be "divested of property of which he is the absolute master at the "time of affiliation. An adoption does, no doubt, cause a complete "change of lineage, put an end to the status arising from the "natural relationship, and extinguish the capacity of inheritance "in the character of a relation by birth; but it is nowhere "represented to be equivalent to civil death so as to extinguish the "adopted son's existing proprietary rights."

A great deal of argument was addressed to us with reference to the exact meaning of the Sanskrit word "*haret*" in the text of Manu which is variously translated "claim," "take," "share," and which Sarkar in his latest work translates "take away." On the one side it was pointed out that in some of the *ślokas* of Manu the same word is translated and can properly be translated only by the word "inherit," while, on the other side, attention is drawn to at least one passage where it cannot refer to inherited property. The arguments do not seem to bring us any nearer to the question which has to be decided.

We may, however, say that we are not prepared to accept Mr. Sarkar's present view that Manu and the commentators have hitherto not been correctly translated, and that this has led to erroneous views as to the consequences which flow from adoption.

We think too that there is great danger in speaking of adoption as civil death and a re-birth, and in attempting to enforce the consequences that might be supposed to logically flow from those conceptions.

It is clear from the passage in the Dattaka Chandrika (page 64, Stokes' 'Hindu Law Books') which we have already quoted that the idea of re-birth in the new family is only partially given effect to, for it is expressly provided that the initiatory rites which the boy has undergone in his natural family are not to be cancelled and performed afresh in his adoptive family. He is only required to perform in the new family those ceremonies which had not been performed in the old. For the purpose of these ceremonies there is no idea of death or re-birth. There is only one continuous existence. It would be easy to show that in other respects also the

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analogy is misleading. It seems to us unsafe to determine the rights of parties by a reference to any such analogies, rather than by the exact language of the texts and the general principles of the Hindu Law in cases where the texts do not definitely decide the question raised.

In this connection we may observe that the District Judge has allowed Mr. Sarkar and others to give evidence on commission as to the meaning of the various texts, and as to the correct view of the Hindu Law on the question in dispute. The question in dispute is not one of foreign law and we are not aware of any provision of the Indian Evidence Act or other law which renders such evidence admissible in a case like the present.

We are of opinion that the adoption of Narayya (17) did not operate in law to divest him of his rights in the Medur estate.

The result of our findings is that Appeals Nos. 122 and 123 of 1900 and Appeal No. 32 of 1904 must be dismissed with costs, and Appeal No. 41 of 1904 must be allowed in regard to one-third of the Medur estate including the moveables appertaining to it, and it is dismissed in other respects. Proportionate costs will be given to both sides in this Court in Appeal No. 41 of 1904 and in the lower Court in Original Suit No. 44 of 1899.

APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice Sankaran Nair.

NACHIAPPA CHETTIAR (PLAINTIFF), APPELLANT,

v.

CHINNAYASAMI NAICKER (FIRST DEFENDANT),
RESPONDENT.*

1906.
March 23,
26, 27.
April 10.

*Hindu Law—Impartible property—Liability of, for debts in the hands of successor—
Impartible property which is not self-acquired is not assets for debts of previous holder.*

Debts contracted by the holder of an impartible estate which is not such holder's self-acquired property, are not binding on his successor, who takes by survivorship, when they are contracted for purposes which will not be binding on him if the property was ordinary partible property; and such property is not assets in the hands of the successor for the payment of such debts, because he could not have questioned any alienation of the same by his predecessor.

Per Sankaran Nair, J.—An undivided member who succeeds to ancestral impartible property to the exclusion of nearer heirs of the last holder, does so only by right of survivorship. *Katama Nachiar v. The Raja of Sivaganga*, (9 M.I.A., 543, at pp. 611, 614); and not simply as a member of the family of which he and the last holder were undivided members.

When the acquisition or recognition of ownership is due to a process of evolution or to judicial decisions extending over a comparatively long period of time, such ownership may carry with it certain incidents appropriate to it in its earlier stages but from which rights of ownership acquired in well known and recognised modes are free.

The decisions which, by negating coparcenary rights in impartible estates and the power of questioning alienations incidental thereto, have recognised ownership in the holders of such estates do not therefore render it necessary to disregard the course of decisions in the Presidency and hold that such estate in the hands of the successor must be treated as assets for the payment of debts contracted by his predecessor.

SUIT to recover the amount due on a promissory note executed on the 17th January 1900 in the plaintiff's favour by the deceased Zamindar of Mannarkottai, the elder brother of the first defendant and the husband of the second defendant.

* Second Appeal No. 874 of 1904, presented against the decree of W. W. Phillips, Esq., District Judge of Tinnevely, in Appeal Suit No. 162 of 1903, presented against the decree of M.R. T. Krishnasawmi Naidu, District Munsif of Sattur, in Original Suit No. 526 of 1903.

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The first defendant pleaded that the debt was not contracted for family purposes and as he took the zamin by survivorship, the zamindari was not liable.

The District Munsif held that the debt was not contracted for family purposes and absolved the first defendant and the zamin from liability and passed a decree against the separate assets, if any, of the deceased. He declined to go into evidence regarding the impartible nature of the estate, because the first defendant's written statement had proceeded on the footing that the zamin was ordinary partible property.

On appeal the District Judge affirmed the decree of the lower Court.

Plaintiff preferred this second appeal.

V. Krishnaswami Ayyar and T. V. Gopalaswami Mudaliar for appellant.

The Hon. Mr. *P. S. Sivaswami Ayyar* for *M. R. Ramakrishna Ayyar* for respondent.

JUDGMENTS (SANKARAN NAIR, J.).—The suit is to recover the amount due under a promissory note executed by the late Zamindar of Mannarkottai which according to the appellant (plaintiff) is an impartible zamindari.

The first defendant was the undivided brother and is the successor of the late zamindar and the second defendant is his widow. The lower Courts have found that the debt was not contracted for family purposes or the use of the zamin and have dismissed the suit. In Second Appeal it is contended before us, that as the zamindar is impartible, it is not joint family property, but that it was the property of the late zamindar and liable, therefore, in the hands of the first defendant, his heir, for payment of his debt irrespective of the nature of such debt. In the lower Courts, this plea was disallowed on the ground that it was not properly raised in the pleadings.

I am of opinion that the lower Courts are wrong in not deciding this question and that the plaintiff is entitled to a decision on this point. I accordingly proceed to decide whether the plaintiff is entitled to recover his debt out of the zamindari, assuming in favour of the appellant, that Mannarkottai is an impartible zamindari.

It is conceded that the late zamindar was an undivided member of his family, that the zamindari was not his self-

acquired property, and that the first defendant rightly succeeded to it in the absence of any son of the deceased as the brother and an undivided member of his family in preference to his widow, who is the rightful heir and successor to any property of the deceased zamindar either self-acquired or held by him as a divided member of such family.

The argument that the zamin is assets for the payment of the debts of the late zamindar is based on the ground that, according to certain decisions of the Privy Council, he had full power of alienation, and the estate was his absolute property subject only to the claim for maintenance of the first defendant or any other member of his family.

For a long time the prevalent opinion was that there were no proprietors between the Government and the cultivating ryot. According to this view the zamindars or poligars were the descendants of Police or Revenue officers under the former rulers, who were remunerated by them with the grant of lands or assignments of revenue, and it was assumed that their rights in the properties assigned continued unaltered under the British Government. Succession was not treated as governed exclusively by the laws of inheritance. The ruling power disposed of such question, as it deemed most expedient, and the succession of the legal heir depended, if not absolutely upon the arbitrary will of the Government, at least upon his selection by the latter, and it was laid down that the hereditary interest in those estates was created for the first time by the Sannads granted under Regulation XXV of 1802. See the decisions reported in the 1st Volume of Select Decrees, pages 80, 141 and 172. That conclusion was arrived at upon the Regulation and "by information obtained from other sources."

The decisions in *Subba Chetty v. Masti Immadi Rani*(1) and *Arbuthnott v. Oolaguppa Chetty*(2) treated the poliemis only as life estates, and the judgment in *Chauki Gounden v. Venkataramanier*(3) states that such was then the generally received theory. This was probably true under the Hindu and Muhammadan Governments in the case of those zamindars or poligars who were only Revenue or Police officers before custom rendered their estates hereditary.

(1) 3 M.H.C.R., 303.

(2) 5 M.H.C.R., 303.

(3) 5 M.H.C.R., 208, 211.

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Public policy under the Hindu and Muhammadan rulers required indivisibility. No part of the zamindary could be alienated, and each holder was bound to hand over to his successor the entire estate. Where the holder was supposed to have only a life estate, his alienation of course could not bind his successor. Where he held under a permanent sannad it was decided under the terms of the Regulation that he had an estate for life with remainder to his heirs and successors in perpetuity. In neither case could the estate be treated as assets for the payments of debts. This was the state of the law till 1870. In that year, by their judgment in the Marungapuri case(1) the High Court held that the Regulation of 1802 only recognized and confirmed the proprietary rights which already existed and provided for the permanent assessment of lands liable to pay revenue to Government; and in strict consonance with this view of the hereditary nature of the estate, the same learned Judges held that the estate must be treated as family property with only a difference in the mode of its beneficial enjoyment due to the possession being vested in a single member (*Gouri Devamma Garu v. Raman Dora Garu*(2)). Thus, while the High Court practically discarded by the first case the theory of the life estate and estate tail and thereby removed all restrictions upon alienation due to the nature of the tenure, in lieu of such restrictions they introduced by the latter decision the restrictions imposed by law upon the managing member of a Hindu family in dealing with the corpus of the estate.

Inalienability by the holder and non-liability to pay his debt after death thus continued therefore to be the rule in this Presidency till the decision in *Beresford v. Ramasubba*(3) which followed the decision of the Privy Council in *Sartaj Kuari v. Deoraj Kuari*(4).

The case in *Sartaj Kuari v. Deoraj Kuari*(4) and the Pittapur case(5) have been so often referred to and commented upon, that I think it only necessary to state the conclusions to be drawn from them. Those cases establish that the rules laid down by the Mitakshara must govern the question of alienability and similar questions, unless such rules are displaced

(1) 6 M.H.C.R., 208.

(3) I.L.R., 13 Mad., 197.

(5) I.L.R., 22 Mad., 383.

(2) 6 M.H.C.R., 93.

(4) I.L.R., 10 All., 272.

by custom; that impartibility is a custom; that the right to partition is such an inseparable incident of joint ownership acquired by birth in a family governed by Mitakshara Law that, where the right to a partition does not exist, there is no joint ownership, and, as admittedly there is no right of partition where the estate has become impartible by custom, there is no joint ownership in any impartible estate; the right to interdict alienations arises from such joint ownership and as the latter is wanting in the case of impartible estates a junior member of the family to which the zamindar belongs is not entitled to question the validity of the alienation, which must therefore be held binding on the succeeding holders of the zamindary.

The right which a junior member of a family has in an impartible zamindary held by the eldest member of the family is therefore only a right to maintenance out of that estate. Thus, though according to the Madras decisions till 1889 the impartible estates were inalienable by the holder in his lifetime and not available for payment of his debts after his death, the law, as then declared, established that they are alienable, and it is now contended before us that as the present zamindar must accordingly be treated as having had no community of interest with the deceased in his lifetime as the latter had the power of alienation and therefore was the owner of the estate, it is liable in his hands to satisfy the debts of the deceased.

The decisions, as pointed out, clearly establish in my opinion that the deceased and the first defendant were not coparceners or joint tenants. There was no unity of possession, of enjoyment or interest. There is no benefit of survivorship then, as that term is understood in English law, and, if unfettered freedom to alienate only subject in some cases to claims for maintenance is the test of ownership, and any property which a person can alienate and of which a person is so proved to be the owner is assets for payment of his debts then the Zamindar, defendant, must be held liable to pay the debts out of the estate.

The main argument on the other side is that this theory of ownership in the Zamindar is incompatible with the recognised rule of devolution of impartible estates.

Hindu Law recognizes two courses of descent. The law as declared in Section I, Chapter II, of the Mitakshara declares generally the right of the widow to succeed to the property of a

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sonless Hindu. It has never been disputed that the widow takes the whole estate of a man who dies without male issue and separated from the other members of the family. But in considering the question of devolution of the self-acquired property of a person not separated from the other members and remaining undivided with them at his death the Privy Council have laid down the following propositions:—

Firstly.—“That the law of succession follows the nature of the property and of the interest involved in it.” Therefore the family may remain undivided. But if the impartible zamindari is the separate property of any member of the family it will go to his widow, if sonless, and not to any coparcener. See *Katama Natchiar v. The Raja of Sivagunga*(1) and *Rajah Suraneni Venkata Gopala Narasimha Row Bahadur v. Rajah Suraneni Lakshma Venkama Row*(2). The first defendant therefore would not be entitled to succeed to the zamindari as being an undivided member of the family of the deceased, if it were the separate property of the zamindar. The other proposition laid down by the Privy Council is that “it is on the principle of survivorship that the qualification of the widow’s right established by the Mitakshara, whatever be its extent, must be taken to depend.” Their Lordships say “according to the principles of Hindu Law, there is coparcenaryship between the different members of a united family and survivorship following upon it. There is community of interest and unity of possession between all the members of the family and upon the death of any one of them, the others may well take by survivorship that in which they had during the deceased’s lifetime a common interest and a common possession.” The widow’s claim, therefore, can only be postponed to claim by survivorship. This rule of succession as to impartible estates has been re-affirmed and acted upon by the Privy Council even after the case in *Sartaj Kuari v. Deoraj Kuari*(3). See *Jogendra Bhupati Hurrochundra Mahapatra v. Nityanand Man Sing*(4). It is contended, therefore, that when the first defendant succeeded in preference to the widow he took the estate by survivorship and such estate is not liable in his hands to payment of the debts of the deceased. It is argued before us on the other side that, as

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there is no coparcenary or joint tenancy, neither community of interest nor unity of possession in the case of an impartible zamindari, there can be no survivorship, and, therefore, when it is stated that the brother takes as survivor, it only means that he takes as the member of a family of which the two persons were undivided members. But the decision of the Privy Council in the Sivaganga case already cited precludes us from accepting this suggestion made on behalf of the appellant. It is the nature of the property that determines the succession. It is the community of interest in the property in dispute and the unity of possession so far as such property is concerned that is the foundation of the right to take by survivorship. It is true that their Lordships have not explained how there can be any survivorship where there is neither coparcenary nor joint tenancy, but we cannot for that reason hold against the express decisions of the Privy Council that the first defendant did not take by survivorship. Otherwise he cannot exclude the widow, the second defendant.

Mr. Mayne is probably right in saying that after the decision in *Sartaj Kuari v. Deoraj Kuari*(1) and the *Pittapur case*(2), that survivorship as a rule governing the law of succession to an impartible estate is only a survival from a theoretical coparcenary.

A peculiar mode of devolution of ownership may make it subject to exceptional incidents of property, and when the acquisition or recognition of ownership is due to a process of evolution, to a series of decisions extending over a comparatively long period of time, or to judicial legislation as called by some, such ownership may carry with it certain incidents appropriate to it in its earlier stages but from which rights of ownership acquired in well known and recognized modes are free.

Illustrations may be found in Hindu as in English Law.

A Hindu widow is at liberty to dispose of the income from her husband’s estate. But if she has not disposed of such income, it becomes a part of the husband’s estate, goes to his heirs, and ceases to be available to satisfy her debts.

Before the Married Women’s Property Act, the husband was entitled absolutely to his wife’s leaseholds. He had power of alienation, though not by will, without her consent. But if he did not alienate them and she survived him she took the estate free

(1) 9 M.I.A. 543 at pp. 611, 614.
(3) I.L.R., 10 All., 272.

(2) 13 M.I.A. 113 at p. 140.
(4) I.L.R., 18 Calc., 151.

(1) I.L.R., 10 All., 272.

(2) I.L.R., 22 Mad., 383.
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from any obligation to discharge his debts. Again, before Lord Romilly's Act, 3 and 4, Will. 4, Cap. 104, the simple contract creditors could not proceed against the real estate of the deceased except when he was a trader, and copyholds were not assets for payment of even specialty debts.

We are not therefore compelled to disregard the course of decisions in this Presidency and hold that the zamindari must be treated as assets in the hands of the present holder for the payments of the debts of the last zamindar deceased, because the latter had the power to alienate it.

The Second Appeal, in my opinion, must therefore be dismissed with costs.

MOORE, J.—The District Judge observes in his judgment that, as the Mannarkottai estate was not shown to be impartible, the doctrine laid down in *Sartaj Kuari v. Deoraj Kuari*(1) was not applicable. He has, however, not tried the question as to whether the estate was impartible or not on the date on which exhibit A was executed.

I was accordingly, at the commencement of the hearing of this second appeal, of opinion that an issue as to whether the estate was impartible or not should be sent down to the District Judge for trial. As, however, I concur with my learned colleague in holding that even if the estate should be shown to be impartible the zamin cannot be looked on as assets in the hands of the first defendant for the payment of the debts of the late zamindar, it follows that it is not necessary to send this issue, and I accordingly agree in ordering this second appeal to be dismissed with costs.

(1) I.L.R., 10 All., 272.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

MUTHU VEERA VANDAYAN (PLAINTIFF), APPELLANT,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(DEFENDANT), RESPONDENT.*

1906.
March 29, 30.
April 24.

Darkhast rules—Nature of grant—Power of Civil Courts to interfere where grant set aside by appellate authority on the ground of irregularity of procedure.

A applied to the Tahsildar under rule IV of the Darkhast rules for a grant of land. The Tahsildar made the grant under rule VII on the 10th May 1897, and the grant stated that it was subject to the result of any appeal that might be preferred. On the 15th July 1897 and on the 2nd November 1897 two appeals were preferred to the Deputy Collector against the grant. On the 15th June 1898 the Deputy Collector issued a patta to A in pursuance of the grant. The appeals were heard on the 28th June 1899, after notice to A and the grant by the Tahsildar was set aside on the ground that the notice under rule V was not duly published. A appealed to the Collector and to the Board of Revenue and his appeals were dismissed.

The present suit was instituted by A for a declaration that the lands had become his property, and that the Deputy Collector's order cancelling the grant was null and void, or in the alternative for a decree directing the defendant to pay the kist paid by A and the cost of the improvements effected by him.

The Court of First Instance granted the declaration prayed for. On appeal the Subordinate Judge, holding that it was not open to the Civil Courts to question the propriety of the cancellation by the Deputy Collector, modified the decree by granting the alternative relief claimed in respect of kist and improvements.

On appeal to the High Court, held:

Per Sir Arnold White, C.J.—It is not open to a Civil Court to cancel a patta because some of the formalities of the Darkhast rules have not been observed. It may, however, set aside an order of an Appellate Revenue Tribunal which allows an appeal against a grant by a Revenue officer on the ground of irregularity of procedure if it is of opinion that there is no evidence of irregularity, although it will not be open to the Civil Court to interfere if the Tahsildar declined to make the grant on the ground of irregularity of procedure. In the former case, there is a conditional contract but in the latter there is no contract at all.

* Second Appeal No. 934 of 1904, presented against the decree of M.R.Ry. Y. Janaki Ramayya Sastry, Subordinate Judge of Tanjore, in Appeal Suit No. 328 of 1903, presented against the decree of M.R.Ry. J. S. Gnaniyar Nadar, District Munsif of Tanjore, in Original Suit No. 216 of 1902.

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Per Benson, J.—Under the rules the Tahsildar has power only to make a conditional grant and the issue of a patta does not alter the conditional nature of the grant. A patta is in the nature of a mere bill and is not a grant or conveyance.

It is not open to the Civil Courts to discuss the sufficiency or otherwise of the grounds on which the Darkhast authorities, whether original or appellate, grant or refuse to grant Government lands to parties applying for them, so long as those authorities act within the scope of the authority conferred on them by the rules.

The Secretary of State for India v. Kasturi Reddi, (I.L.R., 26 Mad., 268), referred to and approved.

Sappani Asari v. The Collector of Coimbatore, (I.L.R., 26 Mad., 742), referred to and approved.

THE facts necessary for this report are fully set out in the judgments.

K. Ramachandra Ayyar for appellant.

The Government Pleader for respondent.

JUDGMENTS (Sir ARNOLD WHITE, C.J.).—In this case the plaintiff made an application to the Tahsildar under rule 4 of Standing Order XV of the Standing Orders of the Board of Revenue for a grant of land. Under rule 7, the Tahsildar made the grant. If the procedure laid down in the rules was followed, and it is not suggested it was not, the Tahsildar's order was communicated to the plaintiff (rule 11) and a document was given to him (Appendix III, Form D) stating that his application had been accepted subject to the result of any appeal that might be preferred. The grant was made by the Tahsildar on May 10th, 1897.

Certain parties appealed against this grant. One appeal was put in on July 15th, 1897, and the other appeal on November 2nd, 1897. Rule 13 provides that an appeal lies from the Tahsildar's decision in Darkhast cases if made within thirty days. Both the appeals were therefore out of time and one of them was nearly five months out of time. There is power under the rule to admit an appeal after the prescribed period of limitation if sufficient cause is shown for not presenting the appeals in time. It does not appear whether any cause was shown in this case for not presenting the appeals in time. The appeals, however, were admitted. It seems clear that there was no appeal to the Deputy Collector at the time when, in the absence of an appeal, it became the duty of the Tahsildar, under rule 14, to register the plaintiff, and this being so, the plaintiff was registered in due course.

On June 15th, 1898, the Deputy Collector issued a patta to the plaintiff in pursuance of the Tahsildar's grant. The plaintiff took possession under the patta and is still in possession.

On June 28th, 1899, the Deputy Collector heard the two appeals.

(The date of the first appeal is given in the Deputy Collector's order of June 28th as March 16th, 1897, but this seems to be a mistake as both sides agree that the dates are correctly stated in paragraph 2 of the Subordinate Judge's order of November 25th, 1903.)

By his order of June 28th, 1899, the Deputy Collector cancelled the order of the Tahsildar upon the ground that the A1 notice, which is required by rule 5 had not been duly published, and that the Darkhast proceedings were defective for that reason. The Deputy Collector's order stated that the village was one of those that would be improved by the Vadavar project and it was not, therefore, advisable to assign the land pending the completion of the project. The order does not in terms purport to cancel or withdraw the patta which had been issued by the Deputy Collector the previous year.

It seems to me to be not improbable that when the application for a patta was made to the Deputy Collector the fact that appeals were pending was overlooked and the patta was issued, as of course, in pursuance of the registry by the Tahsildar.

Rule 14 concludes with these words:—"It should be distinctly understood that registry ordered by subordinate officers will be considered only conditional, and that it will be liable to cancellation by a superior authority if the grant is found to be irregular and unauthorized, although there may be not proof of fraud." In *The Secretary of State for India v. Kasturi Reddi* (1), the legal effect of this rule was thus stated: "This is nothing more than an explicit statement of the legal consequence of any of the officers authorized to dispose of land under the Darkhast rules acting beyond the scope of their authority, i.e., that such grants will be invalid, and the mere fact that the land has been registered in the name of the applicant can give him no title as against the Crown. When the proposal of an applicant is accepted by an officer duly authorized in that behalf by the Darkhast rules and

(1) I.L.R., 26 Mad., 268.

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the acceptance is communicated to the applicant, there is a valid contract and disposal of the land, unless the grant was procured by fraud, misrepresentation or mutual mistake as to any matter of fact essential to the agreement (Indian Contract Act, sections 17, 18 and 20). The grant, therefore, cannot be annulled or revoked by the officer who made the grant, by his successor in office or even by the Governor in Council. Under the very terms of the authority conferred upon the various classes of officers, a grant of land made by any one of them, within the scope of his authority, is subject only to one condition, *i.e.*, it may be revoked or annulled by an officer of a higher grade on appeal preferred to him."

With the exposition of the law contained in the passage, which I have cited, I entirely agree.

In the present case the appellants derived no benefit or, at any rate, no immediate benefit from the cancelling of the Tahsildar's order, and it seems to me to be reasonably clear that the Deputy Collector when cancelling the order upon the ground that there had been irregularity in connection with the A1 notice availed himself of the fact that there were certain undisposed of appeals against the Tahsildar's grant—a fact which seems to have been lost sight of when the patta was granted in the previous year—to cancel the order of the Tahsildar not in the interests of the appellants but in the interests of the Vadavar project. I think we have jurisdiction to decide, and it is our duty to decide whether there was any evidence of irregularities in the publication of this notice.

It seems to me that it does not follow that, because it is not open to a Civil Court to cancel a patta because some of the formalities of the Darkhast rules have not been observed (see *Peria Royalu Reddi v. Royalu Reddi*(1)) and the observations of Sir Bhashyam Ayyangar in *Sappani Asari v. The Collector of Coimbatore*(2), it is not open to a Civil Court to set aside an order of an Appellate Revenue Tribunal which allows an appeal against a grant by a Revenue officer on the ground of irregularity of procedure if the Court is of opinion that there is no evidence of irregularity; also, as it seems to me, it does not follow that, because it would not have been open to a Civil Court to interfere if the Tahsildar had declined to make the grant on the ground of irregularity of procedure, it is not open to a Civil Court to interfere where a

(1) I.L.R., 18 Mad., 434. (2) I.L.R., 26 Mad., 742 at pp. 753, 754.

grant is set aside by the appellate authority on the ground of irregularity of procedure if the Court is of opinion that there has been no irregularity. If no grant has been made, there is no contract. If a grant has been made, there is a conditional contract.

In *The Collector of Salem v. Rangappa*(1), a patta which had been issued to the plaintiff was cancelled by the appellate Revenue authority on the ground that the darkhast had not been properly published in the village. This Court was of opinion that the case was one of mistake and the Tahsildar would not have issued the patta if he had known all the facts. The Court nevertheless upheld the grant of the patta to the plaintiff by the Tahsildar. The case of *Tirumalaiswami Ayyangar v. Tirumalai Gounden*(2) is not inconsistent with the proposition I have ventured to lay down.

In the present case the Tahsildar's order was set aside on the ground that the signatories of the A1 notice were not adjacent land-holders. Rule 5 provides that the A1 notice should be signed by the monigar and the karnam and attested by at least two other persons in token of such publication. The rule further provides that the persons should be holding adjacent lands or other persons having prior claims. If there are none of these, or they are illiterate, any two other respectable inhabitants may attest, but in this case the reason why adjacent land-holders have not attested should be explained in the form. It is the duty of the officers who sign the form to obtain the signatures of the attestors. *Omnia præsumentur rite esse acta*. The form signed in this case has not been produced, but in the absence of any evidence to the contrary, I think it must be presumed that the officers took the signatures, other than those of adjacent land-holders because the adjacent land-holders were absent or illiterate. I am of opinion that the fact that the A1 notice was not signed by adjacent land-holders does not *per se* render the grant by the Tahsildar invalid and there cannot be said to have been an irregularity unless it is shown that the provisions of rule 5 had not been complied with.

I think the decree of the Munsif was right and that it should be restored and that of the Subordinate Judge set aside.

BENSON, J.—In this case the plaintiff asked for a declaration that certain land belonged to him. He alleged as his title a grant from Government under the Darkhast rule (S.O. No. 15 of the

(1) I.L.R., 12 Mad., 404.

(2) I.L.R., 19 Mad., 324.

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Board of Revenue), and the question for decision is whether there was a grant which binds the Crown.

The facts are as follows:—

The plaintiff applied to the Tahsildar for the grant of the land and the Tahsildar informed him in writing that his application was accepted *subject to the result of any appeal that might be preferred*. This order of the Tahsildar was on the 10th May 1897. Against this order two appeals were presented to the Deputy Collector, who is the authority authorized to receive appeals against orders of Tahsildar under the Darkhast rules. The appeals were presented in July and November 1897, respectively. The time ordinarily allowed for appeal is only thirty days, but the appellate authority may, under the rules, admit an appeal even after that period if cause is shown, and there is nothing to show that the Deputy Collector did not in these cases act within the scope of his authority in admitting the appeals. The appeals were, therefore, validly pending before him; and while they were so pending, the jamabandi, or annual settlement, came on and a patta for the land was issued to the plaintiff by the Deputy Collector on the 15th June 1898, and the plaintiff took possession on the 20th June 1898. On the 28th June 1899, the Deputy Collector disposed of the appeals and cancelled the order of the Tahsildar on the ground that the A1 notice which is required by rule 5 had not been duly published and that this was a material defect in the darkhast proceedings. The question for our decision is whether the Deputy Collector had authority to cancel the Tahsildar's order. I think that there can be only one answer to the question when stated in this simple way and that answer must be in the affirmative. It is admitted that under the Darkhast rules the Tahsildar had no power to make any grant of land except on the condition that the grant should be subject to the result of any appeal that might be made, and his acceptance of the plaintiff's application was, in fact, expressly made subject to that condition. Appeals by persons entitled to appeal were made to the Deputy Collector, who was the proper authority to entertain appeals, and until they were decided, the grant to the plaintiff must necessarily have remained conditional. The fact that a patta was issued to him and that he was let into possession of the land was not intended to make, and, in fact, could not make any difference in the conditional character of the grant. In regard to

this, there was a great deal of confusion in the argument before us as to the nature of a patta and the effect of its issue. It was constantly referred to as a grant, and it was argued that the Deputy Collector by issuing a patta to the plaintiff in June 1898 confirmed the grant of the land to the plaintiff. That argument, however, proceeds on a fundamental misconception of what a patta really is. As observed by Bhashyam Ayyangar, J., in *The Secretary of State for India v. Kasturi Reddi*(1) "a reference to the form and wording of a patta (see revised forms of village accounts, page 57; and Board of Revenue Proceedings, No. 332, dated 17th July 1900, page 4) will show that it is in the nature of a mere bill, and is not, nor does it purport to be, in the nature of a grant or conveyance (*Freeman v. Fairlie*(2))." With that description of a patta I entirely agree, and if it is borne in mind, the character of the transaction in the present case at once becomes plain. The plaintiff wanted to be allowed to take the plaint land for cultivation and asked the Tahsildar for it. The latter granted it conditionally subject to the result of any appeal. But as appeals take time to dispose of and as cultivators want to cultivate at once while the ground is fit for it after rain, it is usual (and the Darkhast rules recognize the propriety of the practice) to let the applicant take possession at once, but subject to the liability to be deprived of the land if the appeal is successful. The patta is then issued, as a matter of course, at the annual settlement of the revenue payable by persons holding land under Government. It is just as necessary to issue it in the case of temporary or conditional grants as in the case of permanent grants, in order that all concerned may know the amount of the assessment that is payable, and the instalments by which it is to be paid. The patta issued by the Deputy Collector in this case cannot be understood as evidencing a grant by him. He could not, in fact, make any valid grant of the land while the appeals in respect of it were still pending before him. The patta merely shows that in accordance with the conditional grant by the Tahsildar, the plaintiff was let into possession and was required to pay the assessment on certain dates. The issue of the patta did not in any way deprive the Deputy Collector of his jurisdiction to hear and decide the appeals then pending before him, and this is all that he

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(1) I.L.R., 26, Mad., 268 at p. 272.

(2) 1 M.I.A., 305.

did. The decision in *The Collector of Salem v. Rangappa*(1) is in no way opposed to this conclusion. In that case it was the Collector who issued the patta and who subsequently himself cancelled it. It was held by Collins, C.J., and Shephard, J., that the then Darkhast rules made no provision for such revision of a grant by the authority who made the grant, and the Court expressly observed that in that case there was no contention that the patta was issued *conditionally*. In the present case the grant was made by the Tahsildar on the *express condition* that it was subject to appeal, and the cancellation of his order was not by himself but was by the proper appellate authority. In the case of *Tirumalaiswami Ayyangar v. Tirumalai Gounden*(2) the essential facts were exactly similar to those in the present case. The Collector granted certain land to A and issued a patta at the jama-bandi. B after that appealed to the Board of Revenue against the Collector's grant to A and the Board decided that the land should be given to B. This Court (Shephard and Subrahmaniam Aiyar, JJ.) after referring to the case of *The Collector of Salem v. Rangappa*(1) held that "the grant of a patta must, as long as an appeal against the decision of the Collector remains possible, be held to be conditional and subject to the result of the appeal," and the Court upheld the decision of the appellate Revenue authority. So also in the case of *The Secretary of State for India v. Kasturi Reddi*(3) Bhashyam Ayyangar, J., referring to the Darkhast rules observed: "Paragraph 11 provides that order passed in darkhast cases should at once be communicated by the Tahsildar to all the parties concerned, and paragraph 14 provides that when an appeal is admitted, the admitting authority shall forthwith send a notice to the officer whose decision is appealed against informing him of the fact and instructing him to withhold the registry of the land until the appeal has been disposed of, or, if already ordered, such registry will be only considered as conditional till the appeal is disposed of." With these statements of the law I entirely concur, and in the present case, I am of opinion that it is thoroughly established both by reference to the express terms of the grant and by authority, that the registry in the plaintiff's name was conditional on the result of the appeal to the Deputy Collector.

(1) I.L.R., 12 Mad., 404.

(2) I.L.R., 19 Mad., 324.

(3) I.L.R., 26 Mad., 268 at p. 272.

But it is further argued that even if the grant by the Tahsildar was conditional, the Deputy Collector was in error in holding that "the A1 form was not duly published and this is a material defect in the Darkhast proceedings" sufficient to justify him in cancelling the Tahsildar's grant. If it were necessary for me to do so, I would have no difficulty in finding that in this case the A1 form was not duly published, and that this was a material defect sufficient to justify the cancellation of the grant. It is of the utmost importance that grants of land should be made with the knowledge of all concerned, in the manner prescribed by the rules, and if the land is disposed of without this publicity, it is a good ground for interference of the appellate authority. Rule 13 of the Darkhast rules provided that "from the Tahsildar's decision in Darkhast cases an appeal will lie to the Divisional officer." The grounds on which an appeal will lie are not specified, nor are they limited in any way. I take it, therefore, that the appellate authority may exercise the same power in regard to the grant or refusal as the original authority. Can it, for a moment, be held that the Tahsildar could not have refused the application when he found that the A1 notice had not been duly published? If the omission would have justified him in refusing the application, it would equally justify the appellate authority in refusing it. As observed by Bhashyam Ayyangar, J., "if an appeal against the Tahsildar's action is provided by the rules, the departmental appellate authority, may, no doubt, set aside the grant by reason of the Subordinate officer not having observed the formalities prescribed by the Darkhast rules or for any other reason, notwithstanding that the granting officer acted within the scope of his authority" (*Sappani Asari v. The Collector of Coimbatore*(1)) and again the same learned Judge in speaking of the effect of paragraph 13 of the Darkhast rules says "its legal effect is to materially qualify the authority conferred upon an inferior agent (Deputy Tahsildar) by subjecting the exercise of that authority to the control of a superior agent (Divisional officer) who, in the event of the applicant being dissatisfied with the action of the inferior agent and applying to him by way of appeal, is authorized to dispose of the land to which the application relates" (*The Secretary of State for India v. Kasturi Reddi*(2)).

(1) I.L.R., 26 Mad., 742 at pp. 753, 754.

(2) I.L.R., 26 Mad., 268 at p. 280.

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But in my judgment it is not open to the Civil Courts to discuss the sufficiency or otherwise of the grounds on which the Darkhast authorities—whether original or appellate—grant, or refuse to grant Government lands to parties applying for them, so long as those authorities act within the scope of the authority conferred on them by the rules.

To do so would, in effect, be equivalent to an assumption by the Civil Courts of the appellate jurisdiction in all matters connected with the administration of the Darkhast rules. Those rules provide for the procedure to be followed in dealing with applications for State lands, and they provide for the exercise of appellate and revisional powers by certain authorities, and it is not open to the Civil Courts to assume to themselves the appellate powers thus conferred on other authorities. It would, of course, be different if the Revenue authorities, purporting to act under the Darkhast rules, acted outside the scope of their authority, but that is not the present case. In the case of *Subbaraya v. The Sub-Collector of Chingleput*(1) the late Chief Justice Sir C. Turner held that even if the plaintiffs had a preferential title under the Darkhast rules to be granted certain lands the Civil Courts could not enforce them. He dismissed their appeal on the ground that "a Civil Court cannot compel the Revenue authorities to make settlement with a particular person. In that matter the discretion of the Revenue authorities is uncontrolled. It is, therefore, unnecessary to enquire whether the refusal to allow the Mirasidars a preference was, in the case before the Court, justifiable." This case was followed in *Peria Royalu Reddi v. Royalu Reddi*(2) where the Court observed "we are unable to agree in the opinion of the Judge that because some of the formalities prescribed by the Darkhast rules have not been observed, he is entitled to cancel the patta granted to the appellant by the Government. Darkhast rules are departmental and if they are infringed, the remedy for such infringement is also departmental. Irregularities in observing those rules constitute no valid ground of interference by the Civil Courts with a grant of land made by the Government. The land in dispute is entered in the pymash account as waste and, as such, it is at the disposal of Government. It is not competent to the Civil Courts to set aside a grant made

(1) I.L.R., 6 Mad., 303 at p. 309.

(2) I.L.R., 18 Mad., 434.

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by an officer competent to make the grant." So also in the case of *The Secretary of State for India v. Kasturi Reddi*(1) Bhashyam Ayyangar, J., observes: "The bulk of the Darkhast rules, which are in the nature of instructions issued by Government to the various officers concerned, as to the principles which should guide them in entertaining or rejecting applications for grant of various descriptions of land and determining to which of several competing applicants the grant should be made, if at all, and the procedure to be adopted by them do not concern the Civil Courts" and again in *Sappani Asari v. The Collector of Coimbatore*(2) he observed: "It is for the officer empowered to make the grant to judge whether the applicant is really in need of a site and his application is a *bonâ fide* one. The Tahsildar certainly acts within the scope of his authority if he considers a particular person to be a *bonâ fide* applicant and grants to him the site applied for, and the Civil Courts cannot define who a *bonâ fide* applicant is and after investigating whether or not a grantee was a *bonâ fide* applicant hold that the grant does not bind the Crown, because the Court, differing from the Darkhast officer, and also it may be from the appellate Darkhast officer, comes to the conclusion that the applicant was not a *bonâ fide* applicant."

If the Tahsildar in the present case had decided that the A1 notice had not been properly published and had refused the plaintiff's application on that ground, can it, for a moment, be supposed that the Civil Court could have interfered with his decision, and on finding that the notice was, in fact, duly published, could have directed the grant of a patta? If it is incompetent for the Civil Courts to interfere with the original Darkhast authority in such a matter, it is equally incompetent to interfere with the appellate Darkhast authority in regard to the same matter, so long as that authority acts within the scope of its authority for that would, in effect, be an assumption of the appellate jurisdiction by the Civil Court instead of by the Revenue authority in whom it vests under the rules.

It has been suggested that the Deputy Collector's real reason for setting aside the Tahsildar's grant was not the irregularity in publishing the A1 notice, but the fact that the land was found to be valuable, and such as ought not to be granted on darkhast. The

(1) I.L.R., 26 Mad., 268 at p. 277.

(2) I.L.R., 36 Mad., 742 at p. 755.

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Deputy Collector expressly bases his order on the irregularity found by him to exist in the publication of the notice, and I am certainly not prepared without any evidence to say that the Deputy Collector has made a false statement in this official matter in regard to which he has no personal interest. It is true that at the end of his proceedings he adds that the land will be improved by the Vadavar project and that it should, therefore, not be assigned on patta under the Darkhast rules, but I take it that this is merely an explanation of why he does not grant it either to the appellant, or to the original applicant, or order a fresh notice to issue as he would do, with ordinary waste land. Then it is said that the appellant before the Deputy Collector was not granted the land, and therefore had no interest in opposing the grant to the plaintiff. But this is a mistake. When land of this kind is rendered valuable by irrigation works being carried out, it is not usually granted under the Darkhast rules, but is sold by auction, the State benefiting by the price. In the present case the appellant before the Deputy Collector will be able to bid for the land if it is put up to auction, but had he not appealed against the grant by the Tahsildar, he could never do this. He was, therefore, interested in getting that grant set aside and he may eventually benefit by the order of the Deputy Collector. The fact that the Collector and the Board of Revenue based their refusal to grant the land on the ground that it was land affected by the Vadavar project has nothing to do with the matter. They were not acting as appellate authorities, for no second appeal lies (*The Secretary of State for India v. Kasturi Reddi*(1)).

The applications to them can only be regarded as original applications which they were free to deal with on any ground that seemed to them sufficient and without reference to anything that had gone before.

It is also argued that the Deputy Collector when he admitted the appeal ought to have given notice of it to the Tahsildar, and required him to postpone the registry in the applicant's name.

The omission to do this was, no doubt, an irregularity, and it may be that such an irregularity would form a good ground for seeking damages if it caused injury to the person who originally applied for the land. In the present case the lower Appellate

(1) I.L.R., 26 Mad., 268 at p. 277.

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Court has given the plaintiff damages apparently on the ground that this omission, and the delay in disposing of the appeal did, in fact, lead the plaintiff to spend money in improving the land. The defendant has not argued his Memorandum of Objections to this part of the decree, and the damages given seem to be the appropriate remedy to which the plaintiff is entitled; but the omission to give notice of the appeal cannot have the further effect of rendering the appeal itself invalid or deprive the appellate authority of its jurisdiction to hear and dispose of the appeal.

I find, then, that the Deputy Collector acted within the scope of his authority in entertaining the appeal and in cancelling the Tahsildar's order. I find, too, that it is not open to the Civil Courts to question the sufficiency of the ground on which the Deputy Collector, acting within the scope of his authority, set aside the Tahsildar's order but that, if it were open to the Courts to do so, the reasons are sufficient. I must, therefore, dismiss this second appeal with costs.

Sir ARNOLD WHITE, C.J.—As my learned colleague differs, the result will be that under section 575 of the Code of Civil Procedure, the decree appealed against is affirmed and the appeal dismissed with costs. The Memorandum of Objections is also dismissed with costs.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmanya Ayyar and Mr. Justice Benson.

NARAYANASAMI PADAYACHI (PLAINTIFF), APPELLANT,

v.

GOVINDASAMI PADAYACHI (DEFENDANT), RESPONDENT.*

Revenue Recovery Act (Madras)—Act II of 1864, s. 35, cl. 5 and s. 39—Certified purchaser at revenue sale can be shown to be only benamidar.

Benami purchases are common in India and effect is to be given to them according to the intention of the parties, except so far as positive enactment directs a contrary course.

* Second Appeal No. 129 of 1904, presented against the decree of B. D. Broadfoot, Esq., District Judge of South Arcot, in Appeal Suit No. 45 of 1903, presented against the decree of M.R.Ry. C. Krishnaswami Row, District Munsif of Chidambaram, in Original Suit No. 732 of 1902.

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Where land has been sold for arrears of revenue under the Revenue Recovery Act and the name of the purchaser has been published under section 39 of the Act, such proclamation does not preclude any one subsequently from contending that such purchaser was only a benamidar and the real purchaser was some one else.

Muthunaiyan v. Sinna Samavaiyan, (I.L.R., 28 Mad., 526), followed.

Narayana Chettiar v. Chokkappa Mudaliar, (I.L.R., 25 Mad., 655), overruled.

Suit by the plaintiff to recover lands purchased in the name of his deceased undivided nephew at a revenue sale in June 1901.

The defendant pleaded that the lands were purchased by the plaintiff's nephew with his the defendant's money and for the benefit of the defendant. The District Munsif found the defendant's contention proved and dismissed the plaintiff's suit.

The judgment was upheld on appeal.

Plaintiff preferred this second appeal.

The case came in the first instance before (Moore and Sankaran Nair, JJ.) who made the following

ORDER OF REFERENCE TO A FULL BENCH:—MOORE, J.—In *Narayana Chettiar v. Chokkappa Mudaliar*(1) it was held that where land had been sold for arrears of revenue under the Revenue Recovery Act, II of 1864, and the name of the purchaser had been published in pursuance of section 39 of that Act, the effect of such proclamation was to vest the property absolutely in the purchaser as there named and it was not open to any one to contend subsequently that the purchaser was a benamidar and that the real purchaser was some one else. Two prior decisions of the Court (*Tirumalaiah Pillai v. Swami Nrikan*(2)) and *Subbarayar v. Asirvatha Upadesayyar*(3) were referred to, but it was held that they were not really in conflict with the conclusion arrived at.

In a more recent decision (*Muthunaiyan v. Sinna Samavaiyan*(4)), it has however been held that section 8, clause 5, and section 39 of the Revenue Recovery Act do not declare directly or by implication that *benami* transactions are illegal, and that the real purchaser at a revenue sale is consequently not precluded from showing that the certified purchaser was only a benamidar. The same question has now come before Mr. Justice Sankaran Nair and myself in Second Appeal No. 129 of 1904 and such being the

(1) I.L.R., 25 Mad., 655.

(2) I.L.R., 20 Mad., 494.

(3) I.L.R., 18 Mad., 469.

(4) I.L.R., 28 Mad., 526.

case as there is a clear conflict between the decision in *Narayana Chettiar v. Chokkappa Mudaliar*(1) and that to be found at *Muthunaiyan v. Sinna Samavaiyan*(2) which it would be hopeless to attempt to reconcile, it appears to me that the question should be referred for determination by a Full Bench. A further question has been raised in this case. The District Munsif has found that the plaintiff, or to write more correctly, Venkatachallam, (since deceased) the son of the plaintiff's undivided brother, purchased survey field No. 548 "for the benefit of himself and of the defendant and of one Krishna Aiyar to the extent of their respective antecedent rights" in that survey field, and that it was proved that the defendant prior to the sale under Act II of 1864 (Madras) was the owner of the lands to which the present suit relates. He consequently held that the purchaser's position was that of a trustee. The District Judge has recorded no clear finding as to this, but he appears to accept the conclusion arrived at by the District Munsif. The question as to the effect, if any, of the provisions of section 32 of the Trusts Act, II of 1882 on a transaction such as that under consideration was mooted at the hearing of *Narayana Chettiar v. Chokkappa Mudaliar*(1), but the Judges refused to allow it to be argued as it had not been raised in either of the lower Courts. It was discussed at considerable length in *Muthunaiyan v. Sinna Samavaiyan*(2)—*vide* judgment of Mr. Justice Sankaran Nair, pp. 533-539. The view that I take of this matter is that section 82 of the Trusts Act must be read with section 96. It is observed as follows in the decision of the Judicial Committee of the Privy Council in *Mussumat Buhuns Kaur v. Lalla Buhoree Lall*(3). "It is well known that *benami* purchases are common in India and that effect is given to them by the Courts according to the real intention of the parties. The legislature has not, by any general measure, declared such transactions to be illegal; and, therefore, they must still be recognized, and effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course." It was, I believe, due to the fact that *benami* transactions are common in India, that sections 38, 39 and 40 were inserted in Act II of 1864 and the question therefore that I wish should be

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(1) I.L.R., 25 Mad., 655.

(3) 14 M.I.A., 496.

(2) I.L.R., 28 Mad., 526.

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decided by a Full Bench is whether the effect of the provisions of those sections is to prohibit Courts from giving effect to transactions such as that which has given rise to the present suit. If the obligation that the District Munsif has found was laid on Venkatachallam in consequence of the understanding entered into by him with the defendant and others is held to be an obligation in evasion of the provisions of Act II of 1864 to which reference has already been made, section 96 of the Trusts Act shows that no obligation was created.

The question that I wish to refer to a Full Bench is the following:—

“Where land has been sold for arrears of revenue under Act II of 1864 (Madras) and the name of the purchaser has been published in pursuance of section 39 of that Act, is the effect of such proclamation to vest the property absolutely in the purchaser and to render it impossible for any one subsequently to contend successfully that the purchaser was a benamidar and that the real purchaser was some one else.”

SANKARAN NAIR, J.—The decisions are in conflict. I agree therefore to refer the question to a Full Bench.

The appeal came on for hearing in due course before the Full Bench, constituted as above.

V. Visvanadha Sastri for K. Narayana Rao for appellant.

N. Seshacharlu for respondent.

The Court expressed the following

OPINION.—We are of opinion that *Muthunaiyan v. Sinna Samavaiyan*(1) was rightly decided. In the earlier case *Narayana Chettiar v. Chokkappa Mudaliar*(2) the attention of the Court was not called to *Mussumat Buhuns Kowur v. Lalla Buhooree Lall*(3). We think *Narayana Chettiar v. Chokkappa Mudaliar*(2) must be overruled.

Our answer to the question referred to us is in the negative.

The case came on for final hearing before (Benson and Wallis, JJ.) when the Court delivered the following

JUDGMENT.—In accordance with the finding of the Full Bench the second appeal fails and is dismissed with costs.

(1) I.L.R., 28 Mad., 526.

(2) I.L.R., 25 Mad., 655.

(3) 14 M.I.A., 496.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmaniam
Ayyar and Mr. Justice Benson.

NEELAMEGA SASTRI (PETITIONER—FIRST DEFENDANT,
APPELLANT,

v.

APPIAH SASTRI (RESPONDENT—PLAINTIFF), RESPONDENT.*

Indian Companies Act VI of 1882, s. 4—What is ‘association’ within the meaning of—Legal relation creating joint or mutual rights necessary—Chitfund.

“To constitute an ‘association’ within the meaning of section 4 of the Indian Companies Act, the existence of a legal relation between more than twenty persons, giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary.”

Panchena Manchu Nayar v. Gadinhare Kumaranchath Padmanabhan Nayar, (I.L.R., 20 Mad., 68 at p. 73), referred to and approved.

Where more than twenty persons enter into an agreement by which a chitfund is created and it is clear from the agreement that the only proprietors of the fund are the two organisers and the other persons have entered into no contract with each other, the parties to such agreement do not form an association of which registration is necessary under section 4 of the Indian Companies Act.

SUIT for money by one of the subscribers to a chitfund against one of the two managers of the fund and the representatives of the other deceased manager.

The terms of the agreement (exhibit B) by which the chitfund was created are set out in the order of reference.

The first defendant contended that the parties to exhibit B, i.e., the two managers and the subscribers constituted an ‘association’ within the meaning of section 4 of the Companies Act and as such association consisted of more than twenty persons and was not registered, the suit was not maintainable.

The District Judge passed a decree in favour of the plaintiff. A civil revision petition by the first defendant against the decree was dismissed by Boddam, J.

The first defendant preferred this appeal under section 15 of the Letters Patent.

* Appeal No. 71 of 1905, under section 15 of the Letters Patent, presented against the order of Mr. Justice Boddam in Civil Revision Petition No. 624 of 1904

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The case came in the first instance before (Moore and Sankaran Nair, JJ.) who made the following

ORDER OF REFERENCE TO A FULL BENCH:—MOORE, J.—In *Ramasami Bhagavathar v. Nagendrayyan*(1) which was from the Madura district, it was found that persons more than twenty in number paid each a certain sum monthly to a stakeholder. The sum total of the subscriptions was then paid over as a loan free of interest to one of the subscribers chosen by casting lots, and he was thereupon required to execute a bond with a surety obliging him to continue his monthly subscriptions to the end of the period for which the arrangement was agreed to hold good, that period being as many months as there were subscribers. The bonds in question were executed in favour of the stakeholder and the subscribers. A suit was brought on one of such bonds to recover the amount payable for subscription on account of the period subsequent to its execution. The High Court held that the obligees carried on a business which had for its object the acquisition of gain, within the meaning of the Indian Companies Act, 1882, section 4, and accordingly, as it was unregistered, constituted an illegal association and that the suit was not maintainable.

In *Panchena Manchu Nayar v. Gadinhare Kumaranchath Padmanabhan Nayar*(2) from the Malabar district, it appeared that the prize winners in a lottery in which more than twenty persons took tickets covenanted with the promoters of the lottery to continue their subscriptions in respect of the successful ticket for two years more, in accordance with the arrangement under which the lottery was established. The money not having been paid, the promoters brought a suit on the covenant. The High Court distinguishes this case from that in *Ramasami Bhagavathar v. Nagendrayyan*(1) as follows:—"The right to collect the subscriptions due periodically by each ticket-holder rests only with the two organisers. The duty of paying the amount collected to the person entitled is cast upon them. It is to them that, unlike the case of *Ramasami Bhagavathar v. Nagendrayyan*(1), the particular ticket-holder, who, as the prize winner, has received the periodical collection, has to give the necessary securities for the payment of the future instalments due by him. Further, if any ticket-holder commits

(1) I.L.R., 19 Mad., 81.

(2) I.L.R., 20 Mad., 68.

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any default in paying his subscriptions according to the instalments, the proprietors alone are responsible to make up the deficiency caused by such default and are, consequently, at liberty to admit at their discretion persons not mentioned in exhibit I as ticket-holders in lieu of the defaulters. The only obligation each ticket-holder lies under, is to pay his subscription from time to time to the proprietors; and the only right possessed by him is to get from them his several share of the Rs. 25 deducted at the drawing of each lot out of the total collections and distributed among the ticket-holders other than those who have received prizes, and also to receive from the same parties the amount of the prize when he in his turn becomes the prize winner. It is thus manifest that the only persons associated with each other in the sense of possessing joint rights, or being subject to joint obligations, or of having mutual rights and duties, are the two proprietors, whilst the other ticket-holders are, in the language of James, I.J., in *Smith v. Anderson*(1) 'from the first entire strangers who have entered into no contract whatever with each other'."

"It follows, therefore, that the very first condition laid down by the section relied on is wanting here."

If a reference is made to these decisions, it will be found that that in *Ramasami Bhagavathar v. Nagendrayyan*(2) is based on *In re Padstow Total Loss and Collision Assurance Association*(3), while that in *Panchena Manchu Nayar v. Gadinhare Kumaranchath Padmanabhan Nayar*(4) follows *Smith v. Anderson*(1). And it is also worth pointing out that Brett, L.J., who was one of the learned Judges who took part in the decision in *Smith v. Anderson*(1) at the close of his decision in the case in *In re Padstow Total Loss and Collision Assurance Association*(3) states that, the inclination of opinion which he had expressed with regard to the mutual assurance companies in the case of *Smith v. Anderson*(1) could not, in his opinion, be maintained.

In the opening passage in the judgment in *Panchena Manchu Nayar v. Gadinhare Kumaranchath Padmanabhan Nayar*(4) it is remarked that "from the instances which have come before this Court since *Ramasami Bhagavathar v. Nagendrayyan*(2) was decided, it would seem that a notion is coming to be entertained that every

(1) L.R., 15 Ch.D., 247.
(3) L.R., 20 Ch.D., 137.

(2) I.L.R., 19 Mad., 81.
(4) I.L.R., 20 Mad., 68.

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chit or kuri in which more than twenty persons are concerned falls within section 4 of the Indian Companies Act and therefore, if unregistered, is illegal." A consideration of the numerous cases which have, within the last few years, come up for disposal in this Court, shows that the effect of the two decisions in *Ramasami Bhagavathar v. Nagendrayyan*(1) and *Panchena Manchu Nayar v. Gadinhare Kumaranchath Padmanabhan Nayar*(2) has been to cause considerable doubt to be entertained in the mofussil, in dealing with the question as to whether any specific chitfund, kuri or lottery which comes before the Courts is an association which, if unregistered, is illegal or not. For example, in *Narayanasami v. Jambu Aiyar*(3), the following case came before the Court: A kuri was started and an agreement was entered into between the nine defendants and the other subscribers to the kuri. The instrument that was drawn up, while giving the defendants the right to conduct or manage the affairs of the kuri, reserved to the body of the subscribers, who were more than twenty in number, the right in various ways to control the defendants, and otherwise showed that the defendants were merely the agents of the subscribers. Under these circumstances, the question was raised whether the members of the kuri constituted an illegal association, as not having been registered, or whether the defendants were alone the proprietors of the fund as in the case in *Panchena Manchu Nayar v. Gadinhare Kumaranchath Padmanabhan Nayar*(2). The Court held that "the whole body of the subscribers had joined in an agreement to start a chitfund and were all equally interested in it and retained power in themselves to control the acts of their appointed office-holders;" and the Court consequently decided that the case differed totally from that in *Panchena Manchu Nayar v. Gadinhare Kumaranchath Padmanabhan Nayar*(2) and that the association required registration.

I may also refer to a suit regarding a chitfund which recently came before me in revision (*Madasami Asari v. Pechi Asari*(4)). I sent down an issue to the Subordinate Judge as to whether the suit was maintainable, and he returned a finding in the negative on the ground that the chitfund was an association consisting of more than twenty persons having for its object the acquisition of

(1) I.L.R., 19 Mad., 31.
(3) 11 M.L.J., 130.

(2) I.L.R., 20 Mad., 68.
(4) C. R.P. No. 91 of 1905 (unreported).

gain and that, consequently, as it had not been registered, it was an illegal association. I accepted the finding and dismissed the suit.

In the present case, which has come before this Court in revision, the following is an abstract of the agreement (exhibit B) entered into between the parties:—

"Chit jointly entered into by Subramania Sastrigal and Neelamega Sastrigal and the undermentioned members who are fourteen in number:

The sum that amounts at each instalment for the total chits at the rate of Rs. 250 per chit lasting for $6\frac{1}{2}$ years and one day from the first Sunday in October 1899, twice in every year, is Rs. 3,500. The aforesaid two persons shall conduct the chitfund as agents for this, and the said agents shall take as consideration therefor for the benefit of their own families the amount of the first chit without putting it to auction sale, the first agent taking one-third of it and the second agent taking two-thirds. From the other members the agents shall collect for all the remaining chits the amount of their family benefits. If there are arrears in collecting these amounts the outstanding amounts should be paid by the agents themselves. Further, the agents should add to the amount collected their share of the chit and in the presence of the members, should deduct from the amount of the second chit for interest at each of the 13 instalments, the total amount of Rs. 210 at Rs. 60 a thousand, and hold out the chit for sale from the balance amount of Rs. 3,290. The sale of the chits should be concluded in favour of the members that may bid for the lowest amount. The balance of the amount excluding the sum for which the bidding has been made and the amount withheld for interest should be added together and the total amount should from time to time be distributed among all the members of the chit (agents and others) from the second chit to the last chit. The amount for which the chit was bid at the auction sale should be received by the bidders, upon their executing to the agents a hypothecation deed and on the charge of unencumbered properties as security for the chit amount to be subsequently paid. If the agents make default to pay the amount to the purchaser at the auction sale, the purchaser must collect the amount with interest from the properties mentioned in the schedule attached to this document, which have been given as security. If the

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purchasers at the auction sale do not receive the amount for which the chit was purchased after executing a hypothecation deed, the agents are to take the money paid by such persons up till then to make good the amount by which the sale was underbid. If there be any further balance the agent shall collect it from those persons. If the members make default in paying the money at the appointed time, the agent who paid the money for the defaulting members must take the respective share of the defaulting members in the auction 'kasarvatti' profit and should further collect the money with interest at 2 per cent. per mensem. If at any sale the members do not bid, the chit should be immediately drawn and the total amount of interest Rs. 210 at Rs. 60 per Rs. 1,000 should be withheld from the prize money and the prize winners should receive the balance from the agents after executing a proper hypothecation bond, and the amount of interest withheld should be divided by the agents among all the members, agents and others, according to the share of each in the chit. If any of the members that have not bid make default in paying the money, they should be allowed time for payment up to a month before the second instalment. If they fail to pay within the month, they should be excluded from the chit, if the agents wish to do so. If other persons are available to be substituted, the agent should take them as substitutes. The substituted persons should, at the time that they obtain the chit, pay without interest the money that has been paid by the excluded persons. All proceedings, such as the collection of the chit amounts, are to be conducted by the two agents jointly. The agents are to have power to grant remission of the auction 'kasarvatti' profit, enhanced interest, etc. To effect the above conditions this kararnamah is entered into by the members and agents."

It is admitted that, subsequent to the date of this kararnamah, other members were admitted and that at the time this suit was brought the total number of members exceeded twenty. The District Judge in disposing of this matter has decided the question as to whether the subscribers to this chitfund constituted an association, the registration of which was necessary, by the observation that the decision in *Panchena Manchu Nayar v. Gadinhare Kumaranchath Padmanabhan Nayar*(1) showed that

(1) I.L.R., 20 Mad., 68.

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registration was not necessary, as the agreement was of the usual kind and the subscribers stood in no relation to each other, but each subscriber was personally liable to the managers and the managers to him.

It has always appeared to me to be very difficult to differentiate the case dealt with in *Ramasami Bhagavathar v. Nagendrayyan*(1) from that treated of in *Panchena Manchu Nayar v. Gadinhare Kumaranchath Padmanabhan Nayar*(2) and it is quite clear from the cases that came up for the consideration of this Court that this difficulty is felt very largely throughout the districts in which these chitfunds, kuris or lotteries are usually started. There are, as is well known, a very large number of such chitfunds, and I am of opinion that it is very important that all doubts that may be held as to the necessity or otherwise for the registration of such associations should as far as possible be set at rest. I therefore propose to refer for the consideration of a Full Bench of this Court the following question:—

"Did the parties to the agreement (exhibit B) constitute an association of such a nature that, under section 4 of the Indian Companies Act, 1885, registration was necessary?"

SANKARAN NAIR, J.—I agree to refer the question to a Full Bench for decision.

The appeal came on for hearing in due course before the Full Bench constituted as above.

T. V. Seshagiri Ayyar for appellant.

T. Subrahmania Ayyar and B. Panchapagesa Sastri for respondent.

The Court expressed the following

OPINION.—We are of opinion that the test to be applied in cases of this class is correctly laid down in *Panchena Manchu Nayar v. Gadinhare Kumaranchath Padmanabhan Nayar*(2), viz., "to constitute an association, within the meaning of the section, the existence of the legal relation between more than twenty persons giving rise to joint rights or obligations or mutual rights and duties is absolutely necessary."

Applying this test to the instrument in question in the present case we are of opinion that the parties to the instrument are not

(1) I.L.R., 19 Mad., 81.

(2) I.L.R., 20 Mad., 68.

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an association within the meaning of section 4 of the Indian Companies Act, 1882. The organisers of the chitfund in question are described in the instrument as agents but the terms of the instrument taken as a whole show beyond doubt that they really occupy the position of principals or proprietors.

The answer to the question referred to us must be in the negative.

The case came on for final hearing before (Benson and Wallis, JJ.) when the Court delivered the following

JUDGMENT.—The finding of the Full Bench is that the association does not require registration under the Indian Companies Act.

We dismiss the appeal with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

VEERA SOORAPPA NAYANI (PLAINTIFF), APPELLANT,

ERRAPPA NAIDU AND OTHERS (DEFENDANTS NOS. 1 AND 4 TO 14),
RESPONDENTS.*

Hindu Law—Poliems—Impartible estate in the hands of a son, assets for payment of father's debts—Sale of right, title and interest which defendant alone possesses, effect of.

Impartible estate taken by a son by heritage from his father is assets for the payment of the father's debts not contracted for immoral or illegal purposes, and may be attached and sold in execution of a decree for such debts.

Muttayan Chettiar v. Sangili Vira Pandia Chinnatambiar, (L.R., 9 I.A., 128), referred to.

Where, subsequent to the passing of Act X of 1877, in execution of a decree against the owner of an impartible estate, such estate is brought to sale and the proclamation of sale describes the property sold as 'the right, title and interest of the defendant alone' in accordance with the form in force prior to the passing of Act X of 1877, the mere use of such words, which were omitted in the Act of 1877, does not necessarily imply that the interest sold is less than the full

* Appeal No. 180 of 1902, presented against the decree of M.R.Ry. W. Gopalachariar, Subordinate Judge of Bellary and Salem, at Salem, in Original Suit No. 11 of 1897.

proprietary interest. That the law as then established by judicial decisions recognised only a limited interest in the owner, does not of necessity raise the implication in such cases. The nature of the debt and other circumstances may show that the full interest including that of the sons was actually brought to sale and purchased.

Abdul Azis Khan v. Appayasami Naicker, (I.L.R., 27 Mad., 131), distinguished.

The plaintiff and the first defendant were sons by different wives of the deceased Poligar of Bagalur. The deceased father of the plaintiff executed a mortgage of the Poliem in favour of Kotha Nunjappa, deceased (whose representatives were defendants Nos. 2 to 14) who sued thereon and obtained a decree in Original Suit No. 15 of 1875. In execution of the decree the Poliem was sold in 1883 and purchased by Nunjappa, and the defendants Nos. 2 to 5 sold the same to the first defendant in 1893. The proclamation of sale described the property sold as 'the privileges, the rights and interests which the said defendant alone possesses in respect of the property.' The plaintiff, claiming to be entitled by the custom of the family to succeed to the Poliem in preference to the first defendant, instituted this suit to recover the Poliem. He alleged that the Poliem, which was admitted to be impartible, was also inalienable, and that his father had only a life interest therein and that Kotha Nunjappa, who purchased under the proclamation of sale 'the right, title and interest of the defendant alone,' acquired no more than such life interest, and that he, the plaintiff, became entitled to the Poliem on the death of his father in 1885.

The Subordinate Judge found that the Poliem was not inalienable by custom or by the nature of the tenure, but was only an ordinary impartible estate; that Kotha Nunjappa purchased the full proprietary interest, and he accordingly dismissed the suit.

That portion of the judgment of the learned Subordinate Judge dealing with the contention that the Poliem was inalienable was as follows:—

"The next contention of plaintiff's vakil is that the Poliem is inalienable by virtue of its tenure. It is urged that the Poliem was originally granted by the Bejapur Kings for military services, that it continued to be held on military tenure in the time of Mussalman Rulers and finally confirmed by the British Government in consideration of past military services. The deeds of grant by the Hindu or Muhammadan Kings are not produced; but two letters of the Collector of Salem, exhibits GG and XIII contain a reference to the history of the Poliem. From these, it appears that

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the Hosur Poliem was originally granted in 1207 by Hindu Kings for services rendered to the State in battle, that in 1667, it was taken by one of the Rajahs of Mysore and Bagalur given instead, that in 1780 Tippu Sultan ejected the then Poligar and that in 1791 he was restored, but that after the treaty of 1792, he was ejected again. After the cession of the Baramahal, the Poligar, under the protection extended to him by General Harris (exhibit N) returned to his Poliem in 1799 when a settlement was made with him by Captain Graham, who issued a sannad (exhibit Q) under the date the 20th December 1799, in which peishcush was entered as canteroy pagodas 2,150-1-0. Since then, the Poliem continued in the possession of plaintiff's ancestors. Plaintiff's father, the last Poliagar, enjoyed it till 1883 when it was sold in Court auction in execution proceedings of decree in Original Suit No. 15 of 1875 and it then passed to the possession of the purchaser.

"Exhibits O and P, the documents relating to the Mussalman period, do not disclose that military service was rendered by the Poligar, and there is nothing in exhibit N or Q to show that the Poliem was confirmed by the British Government in consideration of military services. It does not appear that military services were ever expected of the Poligar or that he ever rendered such services to British Government. The letter of Board of Revenue to Government, dated 5th November 1849, referred to in para. 4 A of the exhibit XIII disproves this contention. 'It cannot be said that this and similar Poliems were conferred by the British Government as personal or hereditary grants of land revenue in consideration of past services or in the way of pension or compensation, or that they were meant to be confined to the families of the grantees. The Poliems were continued or restored by the Company to their previous holders partly perhaps in reference to their former enjoyment, but chiefly as a revenue and political arrangements. As regards Bagalur there is nothing in Captain Graham's sannad to show that it was restored on account of prior services or at a favourable rate of peishcush—' page 92 of the Fifth Report of the Select Committee to the House of Commons which refers to the Mysore Poligars who were found in actual possession of their Poliems or who had been ordered or obliged to retire from the country during the wars with Tippu Sultan or who had joined the standards of that Prince, states that they were freed from

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all obligations of military service to the State and no longer permitted to maintain an armed force, or to exercise any independent authority. The Bagalur Poligar having been ejected a second time by Tippu Sultan some years before the British advent, there is no ground for assuming that the plaintiff's ancestors were holding the Poliem on military tenure at the time of British advent. The contention that they must be presumed to have continued to hold on military tenure therefore fails.

"In short, there is no sufficient evidence to show that the Poliem was granted by Government in consideration of past military services or for military service to be rendered, nor is there evidence that military service was rendered to the British Government.

"The contention that the Poliem is by custom inalienable seems to be equally groundless. The plaint does not allege the existence of such custom. The specific nature of the custom is nowhere stated; nor does the evidence of plaintiff's first, second and fifth witnesses, who alone speak on this point, make it clear. The plaintiff's vakil argues that the inalienability was recognized by the members of the family and that the creditors and members of the family were conscious of the inalienable character of the Poliem. Exhibit JJ, the plaint in Original Suit No. 15 of 1881, a suit by the first defendant, is said to show first defendant's consciousness of the custom. Exhibit Y recites that when the Poliem was under attachment, the plaintiff's father applied for appointment of a Receiver on the ground that 'the Poliem being in the nature of a Raj, and impartible, is not in itself liable to sale in satisfaction of the debt of a Poligar.' This is said to show consciousness on the part of plaintiff's father of the custom. The case in *Sivasubramania Naicker v. Krishnammal*(1) is cited in support of the proposition that such evidence is admissible to prove custom prevailing in the family. The creditor Nanjappa in his application to Government to reduce the peishcush referred to in exhibit XIII is said to have urged that the Poliem was inalienable. It is urged that in his application for attachment and sale, only the right, title and interest was sought; these are said to show consciousness of the creditor as regards the custom in question. The documents exhibits JJ and Y were both subsequent to the dispute and do not refer to any family custom. As to first defendant's suit, it is clear

(1) I.L.R., 18 Mad., 287 at p. 287.

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that this admission was made with a special object. Nor does the allegation in the petition of Nanjappa referred to in exhibit XIII disclose the existence of a family custom. A family custom to have effect must be proved to be the established rule of the family (*Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar*(1)). It must be proved to be ancient, certain, invariable, and reasonable (*Vayūlinada v. Appu*(2) and *Price v. Browne*(3)). There is no such evidence in this case. In 1818 and 1847 when the Poliem was attached in execution of decree, no objection appears to have been taken by the Poligar or other members of the family on this ground.

"Lastly, the evidence on both sides (plaintiff's Nos. 2 and 8 and defendant's Nos. 1 to 7 witnesses) discloses that in the times of plaintiff's grandfather and his predecessors, 16 villages were given as inams to near relatives besides other inams for temples and for servants. The evidence of defendant's second witness discloses that plaintiff's grandfather, Veerachoodappa, had six daughters and that certain villages were given to their husbands. In few cases where the donee's family became extinct, the Poligar appears to have resumed the inams, but in other instances the heirs of the donees are proved to be in possession and enjoyment. These inams appear to have been given in perpetuity and not as provision for maintenance. A clause in the sannad, exhibit N, referring to the continuance of the existing inams is relied upon by plaintiff's vakil, but this in no way explains the subsequent grant of inams if the Poliem was inalienable."

Plaintiff preferred this appeal.

R. Sadagopachariar for appellant.

C. Ramachandra Row Sahib for the Hon. Mr. P. S. Sivaswami Ayyar for first to third respondents.

JUDGMENT.—In this suit the plaintiff-appellant seeks to establish his right to the Bagalur Poliem in the Salem district, and to recover possession of it with mesne profits. The plaintiff is the eldest son of the late Poligar, who died in 1885. The Poliem was sold in execution of a mortgage decree obtained against the late Poligar in Original Suit No. 15 of 1875, and was purchased in February 1881 by the mortgagee, the late Kotha Nunjappa. The defendants Nos. 2 to 14 are the representatives

(1) 14 M.L.A., 570, at p. 535.

(2) I.L.R., 9 Mad., 44, at p. 46.

(3) I.L.R., 14 Mad., 420.

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of this Nunjappa. The first defendant (who is a younger son of the late Poligar by a junior wife) purchased the Poliem in 1893 from the heirs of Kotha Nunjappa. Thus, the title of all the defendants depends on the validity and effect of the execution sale in 1881, and it is this which the plaintiff attacks. His case is that the Poliem was impartible and inalienable by custom and by reason of its character as a military tenure, that the late Poligar, therefore, had only a life interest in it, that only this interest could have passed and did pass to the defendants in consequence of the sale in execution, and that on the death of the late Poligar in 1885 the Poliem passed to him (the plaintiff) as his eldest son.

In the lower Court the plaintiff also pleaded that the sale was in execution of a decree obtained for a debt contracted for immoral purposes, and was, therefore, not binding on him, but there was no evidence to support this plea and it was abandoned in this Court. In point of fact the debt was mainly one that had been decreed in Original Suit No. 2 of 1837 against the plaintiff's grandfather; long before the birth of the plaintiff and to a small extent it was money borrowed by the plaintiff's father for payment of peishoush due on the estate. As to the contention that the Poliem was by custom and by reason of its tenure inalienable, we may say that there is no sufficient evidence to prove any such special custom or that the estate was held on condition of military service and was therefore inalienable. The Subordinate Judge has dealt with these questions fully and we concur in his conclusions. He has, moreover, shown that in the past considerable alienations have, in fact, taken place without objection on the part of those who would have been interested to object if the estate had been inalienable.

In these circumstances even if the plaintiff as a son were a coparcener with the late Poligar, his interest would be liable to be sold. But it is now settled law (*Sartaj Kuari v. Deoraj Kuari*(1) and *the Pittapur case*(2)) that the owner for the time being of an impartible estate, such as this Poliem admittedly has the full proprietary title, and the son has no such coparcenary interest by birth as he would have under the mitakshara law in ordinary ancestral property.

(1) I.L.R., 10 All., 272.

(2) I.L.R., 22 Mad., 383.

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The appellant, however, contends that, even if the estate were liable to alienation, the sale relied on did not, in fact, extend to more than "the right, title and interest" of the late Poligar, and that those words must be construed with reference to the law as it was then understood to be by the parties; that a long course of decisions prior to the cases of *Sartaj Kuari v. Deoraj Kuari*(1) and the *Pittapur case*(2) had held that an impartible estate was also inalienable, and that, in consequence, the holder of such an estate could not encumber it after his own life. The appellant argued that this was the view of all parties when the sale of the estate took place and that therefore only the life interest of the Poligar in the estate was intended to be sold and was sold. He relied on the recent decision of the Privy Council in the Kannivadi case (*Abdul Aziz Khan v. Appayasami Naicker*(3)).

The principle, however, laid down in that case does not affect the present case, for, the debt in the present case was as we have already seen one incurred for necessary purposes such as would bind the interest of the son even if the property were ordinary ancestral joint property of the family. Moreover, in the case of *Muttayan Chetty v. Sangili Vira Pandia Chinnatambiar*(4) it was laid down by the Privy Council that the estate which a son takes by heritage from his father constitutes assets by descent for the payment of his father's debts not incurred for any immoral purposes, that such an estate may be attached and sold in execution of a decree upon such a debt and the fact that it is an impartible estate does not alter the case (*Muttayan Chetty v. Sangili Vira Pandia Chinnatambiar*(4)). This decision was passed in May 1882, and the sale in the present case took place only in January 1883. There is no doubt but that the sale certificate (exhibit I) clearly states that the whole Poliem was sold. It was the whole Poliem which was mortgaged (exhibit VI) and exhibits Y and Z show that it was the full proprietary right in the Poliem which the judgment-creditor claimed to sell and which apparently the Court attached and intended to sell. No doubt in the sale proclamation (exhibit CC) it is stated that "the privileges, the rights and the interests which the said defendant alone possesses in respect of the property will be sold." This is

(1) I.L.R., 10 All., 272.

(3) I.L.R., 22 Mad., 383.

(2) I.L.R., 27 Mad., 131; (S.C.) L.R., 31 I.A., 1.

(4) L.R., 9 I.A., 128; (S.C.) I.L.R., 6 Mad., 1.

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the English translation of the vernacular version of the clause in the Civil Procedure Code of 1859 which required that "only the right, title and interest of the judgment-debtor should be sold." In the translations the word 'only' has been transferred so as to qualify the word defendant, instead of qualifying the phrase "right, title and interest." "No doubt at the time of the sale (1877) the Code of 1877 had just come into force, and in it the clause requiring the Court to sell "only the right, title and interest "of the judgment-debtor" was omitted, but the old practice of inserting these words as a common form continued in many Courts for sometime after 1877 and it has been frequently held that this phrase does not necessarily imply that the interest sold is less than full proprietary interest. In the present case we agree with the Court below in thinking that it was the full proprietary interest which was intended to be sold and which was sold.

The fact that, though the late Poligar died in 1885, the plaintiff did not then claim the property, and in fact, only brought this suit in 1897, indicates clearly that he did not regard the sale as one that affected only a life interest of his father.

We accordingly hold that the suit was rightly dismissed and we dismiss the appeal with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

ABBAKKE HEGGADTHI (PLAINTIFF), APPELLANT,

v.

KINHIAMMA SHETTY AND OTHERS (DEFENDANTS), RESPONDENTS.*

Mortgage—Simple mortgage, personal liability under exists unless special contract to the contrary—*Absence of specific prayer in plaint no ground for refusing appropriate relief*—*Delay no abandonment of right*—*Contract Act IX of 1872, s. 74, expl., effect of.*

In the case of simple mortgages, the personal liability of the mortgagor exists, unless there is a specific contract to the contrary.

Wahid-un-Nissa v. Gobardhan Das, (I.L.R., 22 All., 453 at p. 461), referred to.

* Appeal No. 140 of 1903, presented against the decree of R. A. Graham, Esq., District Judge of South Canara, in Original Suit No. 23 of 1902.

1906.
March 9, 19,
30.

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Where the plaintiff asks for a decree against the defendants as members of the family and 'for such other relief as the Court may think fit,' the Court ought to grant the plaintiff such appropriate relief as he is entitled to and such relief cannot be refused on the ground that there is no specific prayer for such relief. Though it is within the scope of the authority of the managing member of a Hindu family to execute a mortgage so as to bind the family assets, the plaintiff in a suit on such mortgage is not entitled to a personal decree against a defendant member of the family who is not a party to the mortgage in respect of the money alleged to be in his hands.

Mere delay by the plaintiff in suing to enforce a contract is no evidence of an intention not to enforce its terms. Under the explanation to section 74 of the Indian Contract Act, it is for the Court to decide on the facts of the particular case whether a stipulation for increased interest from the date of default is or is not a stipulation by way of penalty. It was not the intention of the Legislature to enact that such stipulations are always to be considered penal. The explanation was simply intended to meet the decisions in which it was held that such stipulations are not penal and must be enforced.

THIS was a suit to recover the principal and interest due on a hypothecation bond executed by the first defendant and his two deceased brothers in favour of the plaintiff on the 31st August 1891. The defendants Nos. 2 to 18 were the other members of the family.

The plaintiff prayed

- (i) for a decree directing the defendants as members of the family to pay to the plaintiff within a time to be fixed by the Court the sum of Rs. 9,110 and odd due on the mortgage,
- (ii) for an order directing a sale of the property in default, and
- (iii) for such further and other relief as the Court may deem fit to grant.

The material portions of the mortgage deed sued upon were as follows:—

"On account of our urgency we have this day mortgaged to you for Rs. 4,000 the said property subject to an assessment of Rs. 147-11-3 situated within the boundaries mentioned in the said sale-deed No. 844 and consisting of paddy fields, garden land with trees, all sorts of buildings, tanks, wells and forests.

"We shall pay you Rs. 280 by the end of August every year, being the interest on the said amount at 7 per cent. per annum. On failure to pay the interest on the due date every year, we shall (sic) interest on the said arrears of interest at 12 per cent. from the date of default to the date of payment on the liability of the mortgaged properties. We shall pay you the principal amount of

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Rs. 4,000 and the interest permitted to be in arrears with your consent on the 31st August of any year after five years from this date, i.e., after the end of August 1894 and within the end of August 1896, together with the interest for that year in one lump sum on the liability of the said properties.

"On failure to pay the principal amount on the said date we shall pay you the same with interest at 12 per cent. from the date of default till the date of payment on the responsibility of the mortgaged property. For the principal amount, the interest due till payment and all such amounts, these two properties which are free from any prior alienation such as mortgage, sale, mulageni, &c., and from any other liabilities, are responsible. Such is the mortgage deed executed of our own accord."

The plaintiff's claim was made up of the principal amount, the interest due each year with simple interest thereon at 12 per cent.

The third and fourth issues were in the form following:—

Is the plaintiff entitled to enhanced rate of interest?

Is the personal remedy barred?

The material portions of the judgment of the lower Court dealing with these issues were as follows:—

"There is no specific prayer in the plaint for a personal remedy against any of the defendants, and though it is now claimed on behalf of plaintiff against first and second defendants, I do not think that it can be covered by the vague prayer at the end of the plaint 'for such other relief as the Court deems fit to grant.'

"Plaintiff has, I think, by her conduct, disentitled herself to any claim for interest at the enhanced rate provided in the bond. It is very stringent in its terms, but though she says she made several demands for payment, there is nothing to show that she made any demand until a month or two before she instituted the suit. That is to say, she kept quiet all the time that Manjanna Shetty, the person chiefly responsible, was alive, and only sued when the principal was nearly six years' overdue. She has deprived defendant's family of the assistance of Manjanna Shetty in the suit, and it is possible that, if he had been alive he would have been able to adduce some evidence of the payment of interest. It looks as if there had never been any intention to enforce the penal rate in the first place and I decide the third issue in the negative.

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"As a result, the decree will be that defendants as a family, by second defendant their ejaman do pay to plaintiff within six months from this date the principal Rs. 4,000 with interest at 7 per cent. from the date of the document to this date.

"That if they fail to pay within the said date, the properties hypothecated shall be sold and the sale-proceeds applied to the payment to plaintiff of the amount due to her."

Plaintiff preferred this appeal.

The Hon. Mr. P. S. Sivaswami Ayyar for appellant.

K. Narayana Rau for second respondent.

K. P. Madhava Rau for third to eighteenth respondents.

JUDGMENT.—The plaintiff sues on a mortgage of 31st August 1891 executed by one Manjanna Shetty, now deceased, the then ejaman of the defendant's family and his two brothers. The first defendant is one of the brothers. The other defendants are members of the family and the second defendant is also the present ejaman of the family. The mortgage comprises certain items of property and the mortgagor's mortgage interest in some other items.

As regards the latter the plaintiff's allegation, which apparently is not denied, is that the mortgage money has been collected by the second defendant and is now in his hands. The deed provides for payment of interest at the rate of 7 per cent. per annum, with a further provision that, on default, interest at 12 per cent. shall be payable on the arrears of interest. The deed also provides for the payment of the principal on 31st August in any year after five years from the date of the deed with a further provision that, on default, interest at 12 per cent. shall be payable. It appears to have been assumed by all parties, though this is not clear from the translation of the deed, that the deed should be construed as providing for payment of interest at 12 per cent. on the principal if the principal was not paid on 31st August 1896.

The District Judge disallowed the plaintiff's claim for interest at 12 per cent. as regards both principal and interest and gave the plaintiff a decree for the amount advanced with interest at 7 per cent.

He gave a decree against the defendants as members of the family, but declined to give a personal decree against the first or second defendant.

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We think the plaintiff is entitled to a personal decree against the first defendant as one of the parties who executed the mortgage deed.

It seems to us that, on the true construction of the deed, the deed contains a personal covenant to repay notwithstanding the introduction of the words "on the responsibility of the mortgaged property" in the provisions for payment of enhanced interest on default. At any rate the deed cannot be construed as excluding the personal liability of the mortgagor which exists, in the case of a simple mortgage, unless there is a specific contract to the contrary (see *Wahid-un-Nissa v. Gobardhan Das*(1)).

The plaintiff is not precluded from claiming under this covenant by reason of the fact that there is no specific prayer in the plaint with reference thereto. The plaintiff asks for a decree against the defendants as members of the family and such other relief as the Court may think fit. This is enough to enable us to give the plaintiff the appropriate relief if he is otherwise entitled to it (see the judgment of the Privy Council in *Cockerell v. Dickens*(2), and *Gopi Narain Khauna v. Bansidhar*(3)).

The suit is on a mortgage to which the second defendant is not a party and the plaintiff is not entitled in this suit to a personal decree against him in respect of the money alleged to be in his (the second defendant's) hands.

We are unable to adopt the view taken by the learned Judge that the plaintiff has disentitled herself by her conduct to interest at the enhanced rate provided for in the bond. The fact that she delayed in instituting her suit is, in our opinion, no ground for holding that there had never been any intention to enforce the enhanced rate. As regards the contention that the agreement to pay enhanced interest on default was a stipulation by way of penalty and could not be enforced under section 74 of the Contract Act as amended by Act VI of 1899, it is for the Court to decide whether the contract contains a stipulation by way of penalty. If the Court is of opinion that it does, the Court may award reasonable compensation not exceeding the penalty stipulated for. The explanation to the section provides that a stipulation for increased interest from the date of default may be a stipulation by way of penalty.

(1) I.L.R., 22 All., 453 at p. 461.

(2) 2 M.I.A., 353 at p. 339.

(3) I.L.R., 27 All., 325 at p. 331.

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This explanation, as pointed out in *Sankaranarayana Vadhyar v. Sankaranarayana Ayyar*(1), appears to have been introduced to meet the decisions to the effect that when the higher rate of interest is payable as from the date of default and not as from the date of the contract the contract rate is enforceable. The explanation read by the light of the illustrations shows that it is for the Court to decide on the facts of the particular case whether the stipulation is or is not a stipulation by way of penalty. We are of opinion that the stipulation in the present case is not a stipulation by way of penalty within the meaning of the section and that it is enforceable. There is nothing unconscionable or unreasonable about the agreement and the enhanced rate of interest which becomes payable on default is quite moderate.

It was urged on behalf of the respondents that the stipulations were by way of penalty since they provided both for an increased rate of interest and for compound interest, and *Dip Narain Rai v. Dipan Rai*(2), a decision which this Court in *Appa Rau v. Suryanarayana*(3) declined to follow, was relied upon. It is not necessary to discuss the authorities on this point since in the present case, although the plaintiff claims interest at 12 per cent. on interest in arrear she does not claim compound interest on such interest. Even in the view that the stipulations are by way of penalty and that the section applies, it is open to us under the section to award to the plaintiff the penalty stipulated for so long as it is not in excess of the reasonable compensation to which she is entitled, and we are not prepared to say that, in this case, the penalty is in excess of the reasonable compensation to which she is entitled.

The only other point with which it is necessary to deal is the contention put forward on behalf of the respondents that the members of the family are not bound by the contract. We are of opinion that it was within the scope of the authority of the ejaman of the family to make the contract and that the family are bound by it. There will be a personal decree against the first defendant for principal and interest up to date at the contract rate, subsequent interest at 6 (six) per cent. and there will be a decree against all the defendants *quoad* the family assets. The plaintiff is entitled to her costs throughout.

(1) I.J.R., 25 Mad., 343.

(2) I.L.R., 8 All., 185.

(3) I.L.R., 10 Mad., 203.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

ULAGAPPAN AMBALAM AND OTHERS (DEFENDANTS),
APPELLANTS,

CHIDAMBRAM CHETTY AND OTHERS (PLAINTIFFS),
RESPONDENTS.*

1906.
July 26.

Injunction, mandatory—Discretion of Court—Landlord cannot have mandatory injunction in respect of building, if knowing of the obstruction he does not object.

Where the tenant of an agricultural holding, constructs a building of a character not suitable to such holding, with the knowledge of the landlord, such landlord is bound not only to object but to take legal steps to stop the progress of the work; and, in default of doing so, the landlord is not entitled to a mandatory injunction for the demolition of the building. The same principle will apply where the party building is not the tenant but one who does so under agreement with the owner of the kudivaram right.

Benode Coomaree Dossee v. Soudaminy Dossee, (I.L.R., 16 Cal., 252), followed.
Sankaralingam Chettiar v. Stephen Augustus Ralli, (S.A. No. 959 of 1901) (unreported), followed.

Suit for the removal of two houses erected by the first and second defendants on punja lands forming part of the first defendant's agricultural holding and for other reliefs. The land built on was in the holding of the first defendant and one of the houses was built by the second defendant under an agreement with the first defendant. The plaintiffs are the landlords.

The first defendant stated that the houses were built with the permission of the first plaintiff and his father and that in any event, the plaintiffs were not entitled to have the houses demolished, as they had knowledge of and did not object to the construction of the house.

The lower Court found that no permission was proved. As regards the other question as to whether the plaintiffs were estopped by their knowledge, the judgment of the lower Court is as follows:—

"It is urged by defendants' pleader that the plaintiffs having stood by and allowed the buildings to be completed, they are any

* Appeal No. 148 of 1903, presented against the decree of M.R. Ry. W. Gopala Chariar, Subordinate Judge of Madura (East), in Original Suit No. 33 of 1902.

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how not entitled to a mandatory injunction and in support of this contention the decisions in *Benode Coomaree Dossee v. Soudaminy Dossee*(1) and *The Shamnugger Jute Factory Co., Ltd. v. Ram Narain Chatterjee*(2) are cited. In the present case there is evidence on plaintiff's side that in May 1900, and subsequently, objection was taken by plaintiff's officials. The decisions relate to cases where easements of light and air were acquired by prescription against the owner of the adjoining site, who has naturally a right to erect any building without obtaining consent of others. In such cases it was held that a mandatory injunction which is within the discretion of the Court may not be allowed when the plaintiff had abstained from taking legal steps until completion of the building. But in cases like the present no special damage need be proved and the tenant has no natural right to erect buildings other than those compatible with the nature of the holding. The rulings in *Ramanadhan v. Zamindar of Ramnad*(3) which was followed in *Orr v. Mrithyunjaya Gurukul* (4) govern the present case. The latter case also arose in a village of the Sivaganga zamindari and the land on which the building was built was a land held on similar terms. It was held also in *Athikarath Nanu Menon v. Erathanikat Komu Nayar*(5) that mere delay in bringing the suit cannot be sufficient to refuse the plaintiff his rights. I find that plaintiff did object and that he is not estopped from asking for removal of the building."

The lower Court granted a mandatory injunction for the removal of the buildings.

Defendant preferred this appeal.

S. Venkatachariar for *T. Rangachariar* for appellants.

T. Rangaramanujachariar for respondents.

JUDGMENT.—So far as the first defendant's appeal is concerned he having died and his legal representative not having applied to prosecute the appeal, it must be held to abate so far as he is concerned.

As regards the second defendant's case we are unable to agree with the conclusion of the Subordinate Judge. There is positive evidence that the second defendant was permitted by the first plaintiff and his father to construct the building now sought

(1) I.L.R., 18 Cal., 252.

(3) I.L.R., 16 Mad., 407.

(5) I.L.R., 21 Mad., 42.

(2) I.L.R., 14 Cal., 189.

(4) I.L.R., 24 Mad., 65.

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to be removed, and this evidence is strongly confirmed by the permission given by the first plaintiff to this defendant to cut down trees for use in the construction of the building, exhibit II, the receipt granted for the payment made by the second defendant to the first plaintiff, corroborates the defendant's evidence on this point. Exhibit B was an application by the first defendant to the plaintiff's father for leave to construct a house on the land in question, and was made in September 1898, and the plaintiff's peishkar was at once directed to inspect and report on it. According to the plaintiffs, however, no report was made until May 1900 (exhibit C). In the meantime the construction of the building had commenced and was completed about that date. It is impossible to believe that, if permission had not been granted as stated by the defendant, the construction of the house would have been allowed to proceed for so long a time without objection on behalf of the plaintiffs. It was urged that the absence of a written consent indicated that the alleged permission was not really granted. The evidence for the defendants is that they were told by the first plaintiff that they might go on with the building and that written permission would afterwards be given. This evidence is, in our opinion, probably true, and the delay in the institution of the suit for some two years after it was intended to bring a suit as shown by the endorsement on exhibit C (assuming that that document was in existence on the date it bears, which however we have reason to doubt), supports our view. Exhibit V shows that in March 1902 serious disputes had arisen between a large body of the tenants and the first plaintiff, and the present suit was commenced in that month. We think that the first plaintiff's denial of his permission to build was probably the outcome of this ill-feeling. On this ground alone the plaintiff's suit as against this defendant would have to be dismissed. But even if we had to come to a different conclusion on the question of permission, the mandatory injunction prayed for could not, in the circumstances of this case, be properly granted. That from the commencement the landlord was aware that the house was being built is clear. Having regard to the written application made by the first defendant in September 1898, the landlord must have known that the intended building was not of a character suitable to an agricultural holding. It was therefore his duty not only to have objected

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to its construction but also to have taken legal proceedings to stop the progress of the work. He did nothing of the kind but allowed the building to be completed, and after completion he waited for two years before filing this suit asking for its demolition. The case of *Benode Comaree Dossee v. Soudaminey Dossee*(1) is a direct authority that in such circumstances a mandatory injunction should be refused. That case was recently followed in *Sankaralingam Chettiar v. Stephen Augustus Ralli*(2).

It was further urged before us that the second defendant not being himself the tenant, he was in the position of a wrong doer. We are unable to accept this contention. The first defendant was admittedly the holder of the *kudivaram* right and the second defendant had entered into an agreement with him, whereby the second defendant was allowed to build on the land.

We therefore reverse the decree so far as the second defendant and defendants Nos. 3 to 6 who claim through him are concerned and dismiss the suit as against them with costs throughout.

The memorandum of objections is dismissed with costs.

Note (Judgment by SUBRAHMANYA AYYAR and BASHYAM AYYANGAR, JJ., in *Sankaralingam Chettiar v. Stephen Augustus Ralli* referred to above).—So far as the prayer for a mandatory injunction to pull down the buildings which had been completed before the institution of the suit is concerned, we consider that it is not a fit case in which, in the exercise of our discretion, such an injunction should be granted.

Assuming that the suit is within the period of limitation prescribed by article 32 of the Limitation Act and that under that article the period of limitation will not commence to run, until the building is practically completed in the sense that it becomes fit for being utilised for some purpose other than an agricultural purpose connected with the holding, it is undoubted that in this case the plaintiff had full knowledge and also notice of the commencement and progress of the building as a cotton ginning factory about October 1894 and that though he could have taken steps to restrain the defendants from proceeding with the building, he waited for more than a year after the completion of the building at a cost of about a lakh of rupees and then brought this suit for a mandatory injunction and also for a permanent injunction to restrain the defendants from erecting additional buildings on the holding without the plaintiff's consent.

Following the decision in *Benode Comaree Dossee v. Soudaminey Dossee*(1) and the principle of the English cases therein cited and followed, we hold that the mandatory injunction applied for should be refused.

(1) I.L.R., 16 Calc., 252.

(2) S.A. Nos. 959 of 1901 and 64 of 1902 (unreported).

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The mere fact that the Indian Limitation Act unlike the English law prescribes a period of limitation even in respect of suits for obtaining equitable relief does not entitle the plaintiff to obtain the relief, because the suit itself is not barred by limitation if his conduct in the matter otherwise is such as to make it inequitable for the Court in the exercise of its discretion to grant to him a mandatory injunction. On this ground we uphold the decree of the lower Court so far as the mandatory injunction prayed for was refused. As regards the prayer for an injunction in respect of future additional buildings on the holding we think that the plaintiff is entitled to such relief. It is however represented that there is every likelihood of the parties coming to an agreement to the effect that the defendants are to pay an enhanced rent, six times the existing rate, from the date of plaint for the entire holding and to be at liberty to erect further buildings. If the matter is thus adjusted and intimation thereof given to this Court within three weeks from this date, there will be a declaratory decree in accordance with such adjustment and the appeal will stand otherwise dismissed. If no such adjustment be made and the matter communicated to the Court as aforesaid, the decree appealed against will be modified by issuing a permanent injunction restraining the defendants from commencing and erecting any additional buildings on the holding and the decree confirmed in other respects.

In either case each party will bear his costs throughout.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

VYTHILINGAM PILLAI AND OTHERS (SECOND DEFENDANT AND
LEGAL REPRESENTATIVES OF THE SECOND DEFENDANT),
APPELLANTS,

1906.
March 19, 20,
28.

KUTHIRAVATTAN NAIR AND OTHERS (PLAINTIFF AND
DEFENDANTS NOS. 1, 3 TO 7), RESPONDENTS.*

Malabar Law—'Anubhavam' grants, meaning of—Whether the use of the word creates an irredeemable tenure depends on the particular instrument in each case—Limitation Act XV of 1877, art. 131—Applies only when absolute property sold.

A stipulation in a kanom deed that a certain amount in grain or money is granted to the mortgagee as anubhavam does not necessarily create an irredeemable tenure. The word 'Anubhavam' will create an irredeemable tenure only when used with reference to the tenure itself but when used with reference to the allowance such allowance will be perpetual but not the tenure.

* Second Appeal No. 3056 of 1903, presented against the decree of M.R.By. S. Raghunataiya, Subordinate Judge of Palghat, in Appeal Suit No. 877 of 1902, presented against the decree of P. J. Itteyerah, Esq., District Munsif of Palghat in Original Suit No. 408 of 1901.

VYTHILINGAM PILLAI v. KUTHIRAVATTAN NAIR. Whether, in any particular case, the word creates an irredeemable tenure or only a perpetual rent charge in respect of the allowance must be decided on the language of the document.

If the amount of the grant is not specified and if the terms of the document indicate that only a fixed rent is reserved for the grantor and the rest of the produce is given as 'Anubhavam,' an irredeemable tenure will be created; but, otherwise, if the amount of the grant is fixed and the rest is reserved as rent.

Theyyan Nair v. The Zamorin of Calicut, (I.L.R., 27 Mad., 202), referred to and distinguished.

Article 134 of schedule II of the Limitation Act applies only to cases where the vendor purports to sell the property as his absolute property and the vendee purchases it as such.

Radanath Doss v. Gisborne, (14 M.I.A., 1 at p. 19), referred to and followed.

SURT to redeem two items of land demised on kanom by the plaintiff to the first defendant under kaichit, exhibit A, dated 8th February 1866, which was as follows:—

"You have this 27th day of Makaram 1041 granted us a renewed demise on stamp paper worth one rupee bought from the Palghat Munsif's Court on 14th December 1865, in respect of the following properties belonging to your Cherikkal.

"The rent due by us for holding the land on lease, is 55 paras of paddy. The prior kanom and the value settled for the reclamation effected hitherto in the said properties and credited to our account amounts to 700 fanams. The amount allowed for interest thereon (on the said 700 fanams) is 35 paras of paddy and the amount allowed for Anubhavam is 5 paras of paddy. Total amount of the two items is 40 paras of paddy. The balance left after deducting these 40 paras of paddy from the aforesaid rent of 55 paras of paddy is 15 paras of paddy. The amount due at 2 per 10 thereof after payment of the revenue is 3 paras of paddy, and the amount due for paravasi (deficiency in measure) is 3 idangazhis of paddy. Total amount of the two items is 3 paras and 3 idangazhis of paddy. We shall annually pay the said 3 paras and 3 idangazhis of paddy dried, winnowed and cleaned at the Cherikkal and take a receipt."

The first defendant was *ex parte*.

The second and third defendants contended *inter alia* that under exhibit A the properties belonged to the first defendant's Tarward on Anubhavam rights. The second defendant also contended that the plaintiff's suit was barred by Limitation under article 134, schedule II of the Act, as the items were sold by the

Tarward of the first defendant to one Rengiyan in 1877, from VYTHILINGAM PILLAI v. KUTHIRAVATTAN NAIR, whom the second defendant purchased them in 1896.

The District Munsif passed a decree for redemption in favour of the plaintiff. His decree was confirmed on appeal.

The second defendant preferred this second appeal.

Dr. S. Swaminadhan, V. Krishnaswami Ayyar and A. Nilakanthaiyar for second to fifth appellants.

P. R. Sundara Ayyar for eighth respondent.

JUDGMENT.—This is a suit for redemption of certain land. The plaintiff is the Kuthiravattah Nair. The second and the third defendants are the present appellant and third respondent. They are in possession and they alone contest the plaintiff's right to redeem. They claim under exhibit IV which is an assignment obtained by them in 1896 from certain persons who had obtained an assignment in 1871 under exhibit I from the Tarward (family) of the first defendant. The first defendant's family held the land under an instrument which is not produced, but of which exhibit A is the kaichit on counterpart. It was executed by the first defendant and another member of his family in favour of the plaintiff in 1866. The defendants also relied on exhibit II which purported to be a grant from the Zamorin in 1862. The Zamorin claimed to have an undivided half share in the land, but this claim was negatived in recent litigation between the plaintiff and the Zamorin and exhibit II has been held by both the Courts below in the present suit to be a forgery. The second and third defendants' title, then, depends on exhibit A, and the chief question in this suit is as to the extent of the grant evidenced by it. The second and third defendants contend that it evidences a permanent irredeemable tenure, while the plaintiff contends that it is nothing more than an ordinary Malabar kanom redeemable on the expiration of the usual kanom period of twelve years. It recites that the plaintiff grants to the first defendant's family "a renewed writing," on a stamp paper of one rupee in respect of certain land and adds "The rent due by us (first defendant's family) for holding the land on lease is 55 paras of paddy. The prior kanom and the value settled for the reclamation effected hitherto in the said property and credited to our accounts is 700 fanams. The amount allowed for interest thereon (on the said 700 fanams) is 35 paras of paddy, and the amount allowed for anubhavam is 5 paras of paddy. The total amount of the two items

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is 40 paras of paddy. The balance left after deducting these 40 paras of paddy from the aforesaid rent of the 55 paras of paddy is 15 paras of paddy" and the tenant agrees to pay rent calculated in the usual way on this 15 paras. Now this instrument has all the elements of a kanom. The reference to "the prior kanom" of which this is "a renewed writing" the addition of the value of reclamations by the tenant to the prior kanom amount so as to make up the new kanom amount, and the manner in which the rent is calculated, all indicate that it is a kanom demise and the Courts below have construed it as an ordinary kanom, neither more nor less.

The defendants, however, contend that the words "the amount allowed for *anubhavam* is 5 paras of paddy" have the effect of converting the kanom into a perpetual tenure. We cannot for a moment accede to this argument. The word *anubhavam* or *anubhogam* is a Sanskrit word, and literally means "enjoyment." In grants, however, it ordinarily implies hereditary, and, therefore, perpetual, enjoyment; and when used as descriptive of a tenure of land it implies an hereditary tenure; but the word may also be used with reference to an allowance of money or grain which is to be deducted from the rent due to the grantor. In such a case though the allowance may be perpetual or may operate as a rent charge on the land, it by no means follows that the tenure is irredeemable. Whether the word implies an irredeemable tenure or only a perpetual rent charge of grain or money must depend on the language of each document. This two-fold use of the word is supported by authority, and it is sufficient, we think to explain and reconcile the several cases that have been relied on by either side in the argument before us. In Greeme's 'Glossary, which is a standard authority with regard to the meaning of legal and revenue words and phrases in Malabar, this two-fold use of *anubhavam* is clearly stated. It is defined as "A deed of gift of land as a reward for services performed, answering, perhaps, to inam land. The holder cannot be dispossessed, and the right is hereditary; but if the grantee or any of his descendants die without heirs, the land reverts to the janmi, and on the succession of heirs the janmi is entitled to *purushantaram*. In some instances a trifling payment of one or two fanams is made by the grantee to the janmi in token of acknowledgment of proprietorship."

"An hereditary grant of *Anubhavam* of the purapad, or residue of purapad after deducting mortgage interest, which remains in the hands of a mortgagee, is sometimes made to the mortgagee himself, or to some other person not connected with the land to whom the mortgagee is required to pay it."

In *John Pillai v. The Collector and Agent to the Court of Wards, Kavalapara Estate*(1), Muthusami Ayyar and Wilkinson, JJ., had to consider a document very similar in its essential terms to the present, and they then said: "The main question to be determined is whether the kanom created by exhibit VII is perpetual and irredeemable. The material words in the document to which our attention is drawn are these 'the balance of *micharam* due to me, namely, 118 paras and $6\frac{1}{2}$ *edangalies* of paddy I make over to you and your sons to be enjoyed as *anubhavam* for ever and ever with a liability to pay me 2 fanams a year as *anubhavam kacha*.' The document is termed *ubhayapattola karanam* which means, as explained by Greeme, a kanom deed. This view of the deed is strengthened by the expression used in the instrument 'interest on the kanom amount advanced to me.' The contention that the terms '*anubhavam*' 'you and your sons' and 'for ever and ever' operate to render the kanom irredeemable cannot be supported. The deed must be looked at as a whole. The primary intention of the parties was to create a mortgage and we are not at liberty to ignore it and to treat the document as if it evidenced a sale, the consideration for which consisted of the kanom amount and past services. Reading the document as a whole the intention appears to us to have been to combine in one instrument two independent transactions, viz., a mortgage and a gift of a certain amount of purapad to the demisee and his sons. In this view the gift cannot in any way operate in restraint of the right of redemption any more than if the kanom were granted to one party and the *anubhavam* right to another."

In *Ittappan v. Lakshmi*(2), Collins, C.J., and Shephard, J., stated that the instrument was not unlike that in the case just quoted (*John Pillai v. The Collector and Agent to the Court of Wards, Kavalapara Estate*(1)) and that it must receive a like construction,

(1) S.A. No. 1877 of 1891 (unreported).
(2) S.A. No. 867 of 1893 (unreported).

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(2) S.A. No. 867 of 1893 (unreported).

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and did not operate to give the lessee a perpetual right to the land lent only to the 30 paras of paddy.

In *Kovilkattilunniri v. Ittirarichan Nair*(1), Collins, C.J., and Parker, J., held that a document similar to the present "is clearly a renewal of a previous kanom document and the contention of the defendants that the land No. 1 is held by their Tarwad on anubhavam right is untenable. The real question is whether defendants have a perpetual anubhavam right in 30 paras of paddy from that land. The contention that plaintiff cannot redeem the kanom is untenable," and after a reference to the District Judge, the learned Judges held that the defendants had an "irredeemable anubhavam right to 30 paras of paddy from the land." It will be observed that in all these cases the Court held that an anubhavam grant of paddy did not create an irredeemable tenure of the land in favour of the grantee. The vakil for the defendants however strongly relies on the observations of this Court in the case of *Theyyan Nair v. The Zamorin of Calicut*(2). But the decision in that case, if rightly understood, is in no way inconsistent with the decisions already referred to. In that case the words of the document were "The rent of 29 items is 160 paras of paddy, being the rent due exclusive of allowance for *Adimayavana* as heretofore." The Court there explained that *Adima* meant a "servant" and *yavana* "enjoyment," the whole expression implying an allowance given for service and it added that there was judicial authority for holding that when it applied to a tenure of land it *primâ facie* imported a permanent tenure, just as *anubhavam* implied a permanent tenure. It further pointed out that in that case there were reasons why the grant must be held to have been made for services already rendered and that the amount of the grant, not being specified, must be the produce of the land after deducting the rent settled as reserved for the landlord. The Court therefore held that the instrument created an irredeemable tenure in favour of the grantee. That conclusion is, we think, obviously correct. The grantor reserved a rent of 160 paras of paddy for himself and it had been paid without alteration from time immemorial. He granted the rest of the produce as a permanent allowance for the services rendered. That is just the converse of the present case where the allowance in favour of the grantee is fixed at so many paras of

(1) S.A. No. 1169 of 1894 (unreported).

(2) I.L.R., 27 Mad., 202.

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paddy, and the land is held on kanom tenure, implying the right to redeem the land after twelve years, or to renew the kanom with a readjustment of the rent.

The point to be borne in mind with regard to "*anubhavam*" is that it may be used with reference to tenure of land, and it will then *primâ facie* import an irredeemable tenure, or it may be used with reference to a specified money or grain rent charged on the land and in that case it will not imply any tenure in favour of the grantee. But if the amount of the grant is not specified and if the terms of the document indicate that only a fixed rent is reserved for the grantor and the rest of the produce is given as "*anubhavam*" or "*yavana*," then it may well be that the Court will treat it as creating an irredeemable tenure, so as to secure to the grantee the benefits intended for him by the grant.

In the present case we hold that no irredeemable tenure was created, but that defendants Nos. 2 and 3 are still entitled to receive 5 paras of paddy annually from the land if the plaintiff redeems the kanom.

The defendants Nos. 2 and 3 further rely on article 134 of the Limitation Act as a bar to the whole suit. We, however, agree with the Courts below that that article has no application to the present case. In order to have the benefit of that article the purchaser must show that he is the purchaser of an absolute title, but exhibit I under which defendants Nos. 2 and 3 claim refers to the title of the first defendant's family as a kanom and anubhavam right, and hands over the title-deeds on which that right was claimed. Exhibit A was therefore no more than an assignment of those rights. To borrow the language of the Privy Council in *Radanath Doss v. Gisborne*(1) when dealing with the corresponding provision of the land under the Act of 1859 "we can find in this deed no evidence of a statement on the part of the vendor or of any belief on the part of the purchasers that the property was a property which the vendor claimed to hold by what we should call in this country a fee simple title," and we therefore think that "the first requisite in the law of limitation is not made out, and that the appellants have not shown that they are purchasers of this specific property as an absolute property in contradistinction to a mortgage property upon a contract

(1) 14 M.I.A., 1 at p. 19.

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by the vendor to convey the property to them as an absolute property."

We therefore dismiss the second appeal with costs. The decree will be without prejudice to the right of the defendants Nos. 2 and 3 to their charge on the land.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sankaran Nair.

DOSE THIMMANNA BHUTTA (PLAINTIFF), APPELLANT,

v.

KRISHNA TANTRI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act IV of 1882, s. 52—Lis pendens—Suit for maintenance by widow praying it to be charged on immovable property—Right to immovable property in dispute in such suit.

A suit in which a widow claims to get her maintenance made a charge on immovable property is one in which a right to such immovable property is directly and specifically in question within the terms of section 52 of the Transfer of Property Act; and any transfer of the property during the pendency of the suit, not effected for the purpose of paying off any debt entitled to priority over the claim for maintenance will be affected by the *lis pendens* created by the suit.

Bazayet Hossain v. Dooli Chund, (I.L.R., 4 Calc., 402 at p. 409), referred to and followed.

SUIT to recover the amount due on a mortgage bond executed on the 23rd January 1889 by D, the wife of the first defendant in favour of the plaintiff, under a power of attorney executed by the first defendant in favour of D. One Y, the widow of the first defendant's brother, filed a suit—Original Suit No. 17 of 1888—on the 10th January 1888 for maintenance against the first defendant and D and prayed that the decree amount should be made a charge on the two properties mortgaged to the plaintiff. A decree was passed for maintenance charging the properties on the 31st January 1889. In execution of the decree, Y attached the properties and the first defendant applied to the Court for a certificate

* Second Appeal No. 356 of 1904, presented against the decree of M.R.Ry. U. Achutan Nair, Subordinate Judge of South Canara, in Appeal Suit No. 221 of 1902, presented against the decree of M.R.Ry. T. V. Anantan Nayar, District Munsif of Mangalore, in Original Suit No. 188 of 1901.

authorising private alienation under section 305 of the Code of Civil Procedure. The certificate was granted and the first defendant mortgaged one of the properties, item I of the plaint to the third defendant, on 15th December 1892, and the money raised on the mortgage was paid into Court, and was duly paid out to Y.

The third defendant contended that the mortgage to him should have priority over the plaintiff's mortgage which was affected by the doctrine of *lis pendens*.

The Court of First Instance granted a decree in favour of the plaintiff against item II above, exonerating item I from all liability.

This decree was confirmed on appeal.

Plaintiff preferred this second appeal.

K. Naraina Rao for appellant.

P. R. Sundara Ayyar for third respondent.

JUDGMENT.—The question is whether the plaintiff's mortgage is affected by the *lis pendens* created by the suit brought by a Hindu widow against the mortgagor for the recovery of the amount due to her for maintenance. That suit was filed on the 10th January 1888 and there was a distinct prayer that her maintenance should be made a charge on the property which was afterwards mortgaged by the defendants in that suit to the plaintiff on the 23rd January 1889. On the 31st a decree was passed "on the responsibility of the properties" sued for. It is argued before us on behalf of the plaintiff that this was not a sufficient *lis pendens* as against him.

It is not alleged that, so far as the property in dispute before us is concerned, the mortgage debt due to him was contracted for the purpose of paying off any debt entitled to any priority over the widow's claim for maintenance, or already due by the mortgagor.

In the case of *Bazayet Hossein v. Dooli Chund*(1), the widows of one Khorshed Ali brought a suit against his heir Najmooddin to recover the dower due to them, and they prayed that the dower should be paid out of the estate of the deceased. A decree was passed for an account, declaring the liability of the defendant to pay the amount decreed out of the assets that might have come

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into his hands. The Privy Council held that a purchaser under the decree upon a mortgage bond executed during the pendency of that suit was bound by the decree of the widow. They agreed in the view of the law laid down by Mr. Justice Phear in these terms "I need hardly say that a decree of this kind, directing the person in whose hands the property was to account for it in order that it might be applied for the purpose of discharging the debts due from Khorshed Ali, was a decree against that property, and operative to bind it in the hands of Najmooddin, and therefore of any other person who took from Najmooddin with notice of the decree or under such circumstances as to make him affected by the doctrine of *lis pendens*."

It is contended before us that in the above case there was a prayer by the plaintiff's widows for possession of the property in dispute and that therefore the right to immovable property was directly and specifically in question within the terms of section 52 of the Transfer of Property Act. We do not think that this fact makes any difference. There was no decree for possession and their Lordships of the Privy Council had reference to the decree that was actually passed in so far as it granted the relief that was prayed for. No question of *lis pendens* can arise with reference to a prayer that has been disallowed. This is also the view taken by the Allahabad High Court in *Yasin Khan v. Muhammad Yar Khan*(1).

A suit in which a widow claims to get her maintenance made a charge on immovable property is one in which in our opinion a right to immovable property is directly and specifically in question.

The case before us is stronger than the case in *Bazayet Hossain v. Dooli Chund*(2) above referred to. Here the claim is not simply to recover out of the property in the possession of the defendant, but it was to charge a particular estate.

The plaintiff is therefore bound by the *lis pendens*. It is pointed out that, even in this view, the plaintiff's prayer should not have been entirely dismissed so far as item No. 1 is concerned as the third defendant who now stands in the shoes of the decree-holder claims only as mortgagee. This is so. The plaintiff is entitled to recover his debt out of the property subject to the third defendant's mortgage right.

(1) I.L.R., 19 All., 504.

(2) I.L.R., 4 Calc., 402 at p. 409.

With this modification the decree of the Court below will be confirmed. As the appellant has substantially failed he will pay the third respondent's costs.

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APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice Sankaran Nair.

RATHINAVELU MUDALIAR AND ANOTHER (DEFENDANTS),
APPELLANTS,

v.

KOLANDAVELU PILLAI (PLAINTIFF), RESPONDENT.*

Prescription—Right to cornice acquired by, after 12 years' enjoyment.

Where a man erects a building overhanging the land of another, he commits a trespass for which an action will lie against him and he will by prescription acquire a right to the space occupied by such projection and the right to maintain it in its position.

A cornice overhanging a neighbour's land cannot be removed by such neighbour if it has been in existence for more than 12 years.

Mohanlal Jechand v. Amratlal Bechardas, (I.L.R., 3 Bom., 174), referred to and followed.

THE plaintiff and the defendant were owners of adjoining houses. The two houses were originally tiled houses. The defendant purchased the house now owned by him in 1880, and pulling down the original tiled building erected, in 1883, a substantial terraced building. The cornice projected about one foot over the adjoining house now owned by the plaintiff, who had acquired it by purchase in 1900. The plaintiff pulled down his building and commenced to erect a new structure on the site, and in the course of such construction he attempted to remove the cornice of the defendant's house and to block some new windows opened by the defendant in his newly erected building. On being prevented by the defendant he instituted this suit for a decree directing the defendant to remove the cornice and for other reliefs.

* Second Appeal No. 93 of 1904, presented against the decree of Vernon A. Brodie, Esq., District Judge of Coimbatore, in Appeal Suit No. 87 of 1902, presented against the decree of M.R.Ry. T. Sadasiva Aiyar, District Munsif of Coimbatore, in Original Suit No. 901 of 1900.

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The plaintiff obtained a decree as prayed, granting all the reliefs claimed.

On appeal the decree was confirmed by the District Judge. Defendant preferred this second appeal.

K. Naraina Rao for appellants.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for respondent.

JUDGMENT (SANKARAN NAIR, J.).—The defendant is the appellant. It is found by the lower Courts that the appellant's father having purchased the site in 1880, pulled down in 1883 the old dwelling houses and built a substantial terraced house which rose in height a good deal over the adjoining house of the plaintiff, his neighbour on the east. He constructed a cornice partly for decoration and partly as a protection against the weather for the lower part of the wall. It is nearly a foot beyond the wall and overhangs the ground between, belonging to the plaintiff and also the roof of his house. The ground it overhangs has been found to be in the possession of the plaintiff from 1883, and as the cornice has not been in existence for 20 years no easement has been acquired by the defendant; the lower Courts have accordingly declared that the plaintiff is entitled to remove the defendant's cornice when a new wall which the plaintiff is building reaches it, in so far as it stands in his way of raising the wall.

It is contended before us on behalf of the appellant that though he may not have acquired any right under the Easements Act, yet as the cornice has been in existence for more than 12 years, the plaintiff is not entitled to interfere with it. The case in *Mohanlal Jechand v. Amratlal Bechardas*(1) clearly supports the appellants. It was found in that case that the roof of the defendant's house overhanging the space which belonged to the plaintiff between that house and the plaintiff's to the extent of about 3 feet in width had been in that position for more than 20 years. The learned Judges considered that it was an occupation of space rather than an enjoyment of an easement and treating it as a case similar to the case of possession of an upper chamber of a house while the ownership and possession of the ground floor remains in another, held that the plaintiff could not after 12 years recover possession of the space occupied by the defendant's projecting roof.

(1) I.L.R., 3 Bom., 174.

The case in *Nritta Kumari Dassi v. Puddomoni Bewah*(1) is not in point. There the learned Judges held that no right of easement can be acquired by prescription to a cornice which has been erected merely for the purpose of ornamentation. The claim before us is not one of easement, as the projection has not been in existence for 20 years. Further in that case the defendant built his wall "so as to absorb or include" the plaintiff's cornice, which he might be well entitled to do, even if the plaintiff had acquired a right by prescription to retain his cornice. See *Corbett v. Hill*(2); as the space above and below the cornice might still continue to belong to the defendant. The defendant did not attempt apparently to interfere with the plaintiff's cornice.

The English cases support the view taken by the learned Judges in *Mohanlal Jechand v. Amratlal Bechardas*(3). As pointed out by the Vice-Chancellor in *Corbett v. Hill*(2), "the ordinary rule of law is, that whoever has got the *solum*—whoever has got the site—is the owner of every thing up to the sky and down to the centre of the earth." But this presumption of general ownership arising from the possession of the surface may be rebutted.

If a man were to erect any building overhanging the land of another, he would commit trespass and an action would lie against him (*Fay v. Prentice*(4)). Limitation accordingly would begin to run and he would acquire a right to the space occupied by lapse of time. Whether such trespasser acquires a right only to the space occupied by his projection or whether he acquires a right to the space above and below the protrusion depends upon the nature of the possession and the other circumstances of the case. *Corbett v. Hill*(2) and *Laybourn v. Gridley*(5) are instances where the ownership acquired by grant of the overhanging protrusion or building was held not to convey the ownership of the space overhead. In *Harvey v. Walters*(6), the plaintiff had become entitled by user to a right of having the eaves of his buildings project over the defendant's land, but the plaintiff pulled down the buildings and in re-building them, carried the wall to a greater height and increased the height of the eaves from the ground and the Judges intimated an opinion that the original projection was the real trespass and the new projection above it was only

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(1) I.L.R., 30 Cal., p. 503 at p. 504.

(3) I.L.R., 3 Bom., 174.

(5) L.R., 1892, II Ch., 53.

(2) L.R., 9 Eq., 671 at p. 673.

(4) I.C.B., 828.

(6) L.R., 3 C.P., 162 at p. 163.

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In the case before us the Judge has found that the ground directly below the cornice is still in the possession of the plaintiff and considering the purpose for which the cornice was constructed the defendant in my opinion has not acquired any right to the space either above or below his projection. But according to the cases already referred to, he has acquired a right to the space occupied by his cornice and is entitled to retain the cornice in its present position.

Merely nailing a board so as to overhang another's land may not be a trespass as decided in *Pickering v. Rudd*(1). With reference to the observations of Lord Ellenborough in this case see *Kenyon v. Hart*(2) and Pollock on 'Torts,' 6th edition, page 333. But it has been held that a man has no right to carry electric wires at a height of 34 feet across the portion of the atmosphere which lies above the land belonging to another. *Finchley Electric Light Company v. Finchley Urban District Council*(3).

I am therefore of opinion that limitation began to run when effective possession was taken by the defendant by building his cornice and that the plaintiff's claim to remove the cornice is barred and the decrees of the lower Courts should be modified accordingly by dismissing that part of his claim.

Each party will bear his own cost in this appeal.

MOORE, J.—I concur.

(1) 4 Camp, 219.

(2) 6 B. & S., 249 at p. 252.

(3) L.R., (1902), I. Ch., 866.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

KANDIYIL CHERIYA CHANDU (SECOND DEFENDANT),
APPELLANT,

1903.
March 17, 18.

v.

THE ZAMORIN OF CALICUT AND OTHERS (PLAINTIFF AND
DEFENDANTS NOS. 1 AND 3 TO 8), RESPONDENTS.*

Res judicata—Adjudication in previous suit between co-defendants, in active opposition, *res judicata* in subsequent suit between such defendants.

An adjudication between co-defendants in a previous suit on a point actively contested between them, operates as *res judicata* in a subsequent suit between them, in which they are arrayed as plaintiff and defendant.

Zamorin of Calicut v. Narayanan Mussad, (I.L.R., 22 Mad., 323), followed.

Ramanuja Ayyangar v. Narayana Ayyangar, (I.L.R., 18 Mad., 374), distinguished.

SUIT by the Zamorin of Calicut to recover the plaint properties with arrears of rent and damages.

The plaintiff's case was that the plaint properties were the jenm of the plaintiff's Talil Devaswom and had been leased along with other properties by the said Devaswom to the first defendant's predecessor, deceased Chandu, on the 31st Chingom 1041 (14th September 1865). When thus holding it, first defendant's predecessor, deceased Chathunni, sub-leased the plaint properties to second defendant in the year 1059 (1883-84) or thereabouts and surrendered his own reversion to the said Devaswom under a registered ozhimuri on 10th Karkitagom 1064 (24th July 1889) authorizing plaintiff to recover the property from second defendant. The then Zamorin thereupon granted a melcharth on the 5th Meenom 1068 (17th March 1893) to one Gulam Hussan who assigned it to one Kunhipennu, who in her turn assigned it to the eighth defendant.

The eighth defendant thereupon instituted Original Suit No. 212 of 1898 to recover the plaint lands on the strength of the melcharth of the 17th March 1893. The then Zamorin, the

* Civil Miscellaneous Appeal No. 128 of 1902, presented against the order of M.R.By. K. Krishna Rau, Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 152 of 1902, presented against the decree of M.R.By. M. Babu Rau, Principal District Munsif of Calicut, in Original Suit No. 881 of 1901,

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predecessor in title of the present plaintiff, was the sixth defendant in that suit and the present second defendant was the first defendant. The then sixth defendant supported the claim of the plaintiff in that suit and the then first defendant (now second defendant) claimed the lands as his own jenm property, and denied that he was in possession as sub-lessee of the then sixth defendant as alleged by the plaintiff. The Court in that suit found that the jenm title alleged by the first defendant was not proved and also that the plaintiff failed to prove that the first defendant held as sub-lessee of the sixth defendant. It also found that the then first defendant was in adverse possession for more than 12 years and had acquired a title by prescription and dismissed the suit.

On this state of facts, the second defendant in the present suit pleaded that the plaintiff's claim was *res judicata* by reason of the decision in the previous suit.

The District Munsif held that the suit was barred by *res judicata*.

On appeal the Subordinate Judge held that the suit was not barred by *res judicata* and remanded the suit for trial on the merits.

Against this order of remand the second defendant preferred this appeal.

J. L. Rosario for appellant.

V. C. Desikachariar for P. R. Sundara Ayyar for respondent.

JUDGMENT.—In the former suit (No. 212 of 1898), the present eighth defendant, claiming under an assignment by way of melcharth from the sixth defendant therein (the predecessor in title of the present plaintiff, the Zamorin of Calicut) sued to eject the then first defendant (now second defendant) as being in possession under a sub-lease given to him by the then seventh defendant, who was alleged to be a lessee under the then sixth defendant. The then sixth defendant supported the then plaintiff's claim. The then first defendant, however, claimed the property as his own jenm property and as having been in possession as absolute owner for more than 12 years. Though his jenm title was held not to be proved, it was held in that suit that the sub-lease was not proved, and that the then first defendant did not hold the property as a tenant of the Devaswom represented by the then sixth defendant. It was also held that the then first defendant was in possession as owner for more than the statutory period and had thus acquired title by limitation. The then sixth defendant not

only supported the then plaintiff but took an active part in the controversy and was represented by a vakil in all stages of the suit, both in the Courts below and in the High Court.

We therefore hold that there was an adjudication in the suit between the then sixth and first defendants, that the latter had acquired a title by adverse possession, and this was the ground on which the then plaintiff's suit was dismissed.

Following the decisions of this Court in *Madhavi v. Kelu*(1) and *Zamorin of Calicut v. Narayanan Mussad*(2), we hold that that adjudication is *res judicata* against the plaintiff in the present suit, who is the successor in title of the then sixth defendant, and in favour of the present second defendant, who is the appellant before us.

We may point out that there is no conflict between the two decisions of this Court referred to above and the case in *Ramanuja Ayyangar v. Narayana Ayyangar*(3) as supposed by the Subordinate Judge, inasmuch as there was no conflict on the pleadings of the co-defendants in the latter case, and, in fact, both of them jointly opposed the plaintiff.

We set aside the order of remand of the lower Appellate Court and restore the decree of the District Munsif with costs in this and in the lower Appellate Court.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Moore.

1901.
October 24.

IN THE MATTER OF PONNUSAMI AND ANOTHER, ACCUSED.*

Criminal Procedure Code Act V of 1898, s. 4 (o), and The Cattle Trespass Act I of 1871, ss. 20, 22—Appeal lies against order made under s. 22 of the Cattle Trespass Act.

By section 4 (o) of the Code of Criminal Procedure, the word 'offence' includes an act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act; and a person against whom an order under section 22 of the Cattle Trespass Act is made is a "person convicted on a trial" and is entitled to appeal under section 407 of the Code of Criminal Procedure.

(1) I.L.R., 15 Mad., 264.

(2) I.L.R., 22 Mad., 323.

(3) I.L.R., 18 Mad., 374.

* Case Referred No. 108 of 1901 (Criminal Revision Case No. 384 of 1901) for the orders of the High Court under section 438 of the Code of Criminal Procedure by E. A. Elwin, Esq., District Magistrate of South Arcot, in his letter, dated 9th October 1901.

IN THE
MATTER OF
PONNUSAMI.

THE facts of this case are set out in the Letter of Reference from the District Magistrate of South Arcot which was as follows:—

The entertainment of an appeal against an order passed under section 22 of the Cattle Trespass Act appears to be illegal under the High Court's Proceedings, No. 2113, dated 27th November 1879, printed at pages 676 and 677 of Weir's 'Criminal Rulings' (3rd edition), and I therefore recommend that the Deputy Magistrate's order may be set aside.

The Deputy Magistrate explains that he entertained the appeal under the impression that the award of compensation by the Sub-Magistrate was subject to appeal under section 250, Criminal Procedure Code, and that he was not aware of the above ruling of the High Court.

ORDER.—The District Magistrate has overlooked the change that has been made in the definition of an 'offence' since the ruling of the High Court to which he refers was made. By section 4 (o) of the Criminal Procedure Code as now revised the word 'offence' includes an act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act. It follows that a person against whom an order under section 22 of the Cattle Trespass Act is made is a "person convicted on a trial." In the present case the accused were "convicted on a trial" by a Magistrate of the third class.

An appeal against that conviction therefore lay under section 407, Criminal Procedure Code, and there is no ground for our interference.

We may add that the Deputy Magistrate was wrong in supposing that he was acting, or had any jurisdiction, under section 250, Criminal Procedure Code. That section applies to a case in which compensation is awarded to an accused person, because a frivolous complaint has been made against him. Here compensation was awarded not to the accused but to the complainant, and it was awarded under section 22 of the Cattle Trespass Act, not under section 250, Criminal Procedure Code.

We may also point out to the District Magistrate that in a reference of this kind the essential facts should be briefly stated in the Letter of Reference instead of being left to be gathered by the High Court from a perusal of the record.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Benson.

RAJAH KAVALI ARUNACHELLA ROW BAHADUR
(PLAINTIFF), APPELLANT, IN APPEAL SUIT No. 22 OF 1903

1906.
July 12, 31.

v.

SRI RAJAH RANGIAH APPA ROW BAHADUR AND OTHERS
(DEFENDANTS), RESPONDENTS, IN APPEAL SUIT
No. 22 OF 1903.

GOPI SETTI NARAYANASWAMI NAIDU GARU, RECEIVER,
APPOINTED BY THE COURT AND OTHERS (DEFENDANTS),
APPELLANTS, IN APPEAL SUIT No. 23 OF 1903

v.

RAJAH KAVALI ARUNACHELLA ROW BAHADUR
(PLAINTIFF), RESPONDENT, IN APPEAL SUIT No. 23 OF 1903.*

Transfer of Property Act IV of 1882, s. 55 (5) (d)—Where no contract to the contrary, liability to pay public charges attaches to vendee on the passing of property—Condition precedent to liability—Limitation Act XV of 1877, s. 19—Requisites of a valid acknowledgment.

Under section 55 (5) (d) of the Transfer of Property Act, the liability of the vendee to pay the public charges on the property sold attaches, in the absence of a contract to the contrary, as an incident of the transfer and is complete when the property passes.

Where the adjustment of matters, which form part, but are not the essence and substance of the contract, cannot be carried out in the mode contemplated, the Court will do whatever may be right and proper to effect such adjustment itself.

Dinham v. Bradford, (L.R., 5 Ch., App. 519), referred to.

Where a deed of sale provides that the vendee shall pay "the amount due, as per sub-division of the peshkush due to Government", and the deed contains no other words to show that the sub-division was a pre-requisite to the vendee's liability, the mere use of the words *as per sub-division* does not make it such, and where no sub-division is effected, and the vendor pays the whole peshkush, the Court will ascertain as between the vendor and vendee the proportion payable by the latter, and direct payment thereof.

An acknowledgment of a conditional liability will not, under section 19 of the Limitation Act, give a fresh start as long as the condition remains unfulfilled. There must be an unqualified admission or an admission qualified by a condition which is fulfilled.

* Appeal Nos. 22 and 23 of 1903, presented against the decree of F. H. Hamnett Esq., District Judge of Godavari, in Original Suit No. 28 of 1901.

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SUIT to recover money. The amount was made up of a sum of Rs. 4,037 being the balance of the consideration money due under a sale deed executed on the 24th March 1893 in favour of Raja Papamma Rao, the predecessor in title of the defendants, by the plaintiff and his deceased undivided brother, and the sum of Rs. 2,862 being the amount, with interest, of the peshkush on the village sold which was paid by the plaintiff from the date of sale, i.e., from fasli 1302.

The lower Court awarded Rs. 1,007 with interest on account of the balance of purchase money and peshkush from fasli 1305. The claim for faslis 1303 and 1304 was held to be barred by limitation as the suit was filed more than six years after payment; and the claim for fasli 1302 was included in the sum of Rs. 1,007 awarded for balance of the purchase money. The plaintiff preferred this appeal in respect of the portion of his claim which was disallowed, and the defendants appealed against the items allowed the plaintiff. The contention on appeal was confined to the amount of peshkush allowed and disallowed.

The plaintiff contended that the claim for faslis 1303 and 1304 was not barred as exhibit B, which was within six years of suit contained an acknowledgment of liability.

The defendant contended that the plaintiff was not entitled to sue on account of peshkush paid by him, as the liability of the defendants to pay the peshkush of the village was conditional on the sub-division of the village under the terms of the sale deed, and as no sub-division was effected the plaintiff had no cause of action in respect of the same.

V. Krishnaswami Ayyar and K. Subrahmania Sastri for appellant.

P. R. Sundaram Ayyar and P. Nagabhushanam for respondents.

JUDGMENT.—The questions for decision in these two appeals are whether, as contended by the appellant in Appeal No. 23 of 1903, the suit is premature, and, whether, if that is not the case, the suit in respect of the amount claimed as having been paid by the plaintiff respondent—on account of peshkush for faslis 1303 and 1304, is, as held by the District Judge, time barred.

The facts are shortly these. The village of Repudi, which formed part of the Zamindari of Reddigudem, was conveyed on

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the 24th March 1893 by the plaintiff and his deceased brother to the late Papamma Rao, Zamindari of Nidadavolu, for the sum of Rs. 40,000. A duly registered conveyance was executed and delivered by the vendors to the vendee, and possession of the property was given to her. The village has ever since remained in the hands of the vendee or her representatives, the income thereof being received by them. The price was not paid to the vendors but was retained by the vendee in order that the debts payable by the vendors, and mentioned in the conveyance, might be liquidated therefrom by her, and the balance, if any, paid to the vendors. When the conveyance was executed, the vendors and the vendee applied to the Collector of the district that the village be sub-divided and registered in the name of the vendee and that the proportionate peshkush payable in respect of it be ascertained and assessed. In the instrument of conveyance the vendors entered into a covenant to do at the request of the vendee any further acts that might be necessary in respect of the sub-division, registration and separate assessment of the village. With reference to the communications made to the Collector by the vendors and the vendee as aforesaid, the Collector, on the 20th April 1893, informed Papamma Rao that as the village was registered in the names not only of the vendors but of one, Chendramowli Rao also, her request for sub-division, etc., would not be granted unless "a duly authenticated document bestowing on the two proprietors above named the power of disposing the property of Chendramowli Rao also is produced." This was made known to one Lingiah, now deceased, a pleader who had taken part in bringing about the purchase, and who was a lessee under the plaintiff. Lingiah was asked to obtain certain information from the plaintiff with reference to the point raised by the Collector. There is no direct evidence that Lingiah called upon the plaintiff to furnish the information wanted, but there can be no doubt that the fact that the Collector was raising objections to the sub-division, etc., must have been brought to the notice of the plaintiff in the course of what subsequently took place. For exhibit B, a settlement of account which took place in June 1898 between the agents of the plaintiff on the one hand, and the agent of Papamma Rao, on the other (proved to have been authorised by the respective principals to make a settlement), refers to correspondence between the plaintiff and Lingiah in regard to the

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adjustment of the accounts connected with the purchase money left with the vendee, and it is expressly recorded therein that the settlement is made conditional, among other things, upon the plaintiff procuring the sub-division and the registry of the property in the name of Papamma Rao, and this condition as to the sub-division and registry implies, we think, that the plaintiff was aware why the sub-division and registry had not been effected. Papamma Rao and, after her death, her representatives, abstained from paying any amount towards the public revenue due in respect of the village, and the plaintiff has had to pay the Government demand on the whole zemindari, including the proportionate share that would have been payable by the defendant on account of Repudi if it had been sub-divided and separately registered, as intended by the parties.

Such being the facts, the contention of Mr. Sundara Aiyar for the defendants appellants in Appeal No. 23—was that, under the terms of the conveyance, the plaintiff is not entitled to make any claim with reference to the payments made by him unless and until the exact amount payable in respect of the village has been fixed by the revenue authorities.

We are unable to accept this contention. Now under section 55 (5) (d) of the Transfer of Property Act the buyer is bound to pay all public charges subsequent to the date of passing of the property to him, in the absence of a contract to the contrary. So far as fasli 1302 was concerned the parties to the instrument did enter into a special arrangement which was to the effect that the vendors were to deduct out of the incomes already derived by them from the village for that fasli what was payable for that year in respect of the peshkush of the village and to account for the remainder only to Papamma Rao. As regards subsequent faslis there was no special agreement, the instrument stating generally, in more than one place, that the vendee was to be responsible for the public demand on account of the village and that the vendors should in no way be liable for it. No doubt the words "as per sub-division" occur between the words "the amount due" and "of the peshkush payable to Her Majesty's Government of India" in the passages dealing with the matter. But it seems to us that the introduction of those two words was not for the purpose of making the right of the vendors to claim reimbursement from the vendee of what the vendors might be

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compelled to pay in consequence of the vendee's omission to meet her proportion of the public demand, conditional upon an actual sub-division. The reasonable meaning of the language used is, in our opinion, no more than that the vendee should from and after fasli 1303 be liable for her share of the peshkush, as she would be in the usual course in the absence of a contract to the contrary. Considering that possession of the village had been parted with by the vendors and that all the rents of the village were to be received by the vendee from fasli 1303, there was no sufficient reason for imposing on the vendee only a conditional liability in respect of what was a first charge on the incomes of the village in her hands and which the vendors would not have been required to meet except for her default. If it was the intention of the parties to make any such exceptional terms it would have been done in far clearer words. In our opinion the instrument does in this respect but put in express words the covenant implied by law on the part of the vendee under the provision of the Transfer of Property Act already referred to. The present case cannot be likened to one in which the parties to a transaction agree to an arbitrator doing something with reference to the substance of the matter as a condition precedent to the accrual of a right or liability. The power of the revenue authorities to determine the amount of the separate assessment is not derived from the consent of the parties, but is conferred by the statute, alike in the interests of the private persons concerned, as well as of the Government. Further, the matter for determination has no reference to the liability itself, which attaches as an incident of the transfer and is complete when the property passes. *Dinham v. Bradford*(1) may be referred to by way of analogy. There, two partners made an agreement containing a provision that on the determination of the partnership one partner should purchase the share of the other at a valuation to be made by two persons, one appointed by each partner, and the partnership was carried on for some time under that agreement. It was held that though the valuation could not be so made because no umpire was appointed, the Court would carry the partnership agreement into effect by ascertaining the value of that share. In the course of his judgment Hatherly, L.C., says "It is much more like the case of an estate sold and

(1) L.B., 5 Ch., App. 519.

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the timber on a part to be taken at a valuation, the adjusting of matters of that sort forming part of the arrangement, but being by no means the substance of the agreement, and in such cases the Court has found no difficulty. If the valuation cannot be made *modo et forma* the Court will substitute itself for the arbitrators. It is not the very essence and substance of the contract so that no contract can be made except through the medium of the arbitrators. Here the property has been had and enjoyed, and the only question is what is right and proper to be done with regard to settling the price." It seems to us that the present case is even stronger, and if the parties are unable to agree as to the amount of the proportionate peshkush for Repudi, it is competent to the Court to decide that as between them, pending the determination of the amount by the revenue authorities so as to conclude the question between them and the Government. That here the parties themselves did not consider any action of the revenue authority in the way of fixing the assessment a pre-requisite to the plaintiff's right to claim payment, is clear from their having included in the settlement made by them in 1898, this matter also of the payments by the plaintiff for the peshkush of Repudi up to that time. The question as to whose duty it was to have the sub-division and separate assessment effected does not appear to us to have any real bearing upon the decision of the question under consideration. Assuming for argument that it was the plaintiff's duty to do so, his failure in this respect would, at most, only entitle the other party to damages. But no claim under such a head has been made in the present case as against the plaintiff, and it is unnecessary to pursue this point. We hold that the suit is not premature, and we dismiss Appeal No. 23 with costs.

As regards the other question, viz., of limitation in regard to the payments towards the peshkush for faslis 1303 and 1304, it is to be observed that no charge against immovable property in respect of those payments is sought to be enforced in the present suit. The period of limitation applicable is, therefore, six years, and the suit, in so far as it relates to these faslis, having been instituted more than six years after the time when the plaintiff made the payments, must be held to be barred, unless exhibit B operates as an acknowledgment within the meaning of section 19 of the Limitation Act. The concluding portion of the settlement

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provides: "the Kavalai people (the vendors) should get the Zamindar's name entered in the Sircar Accounts, effect the sub-division, and bring and deliver Vallankivaru's mortgage deed. The said settlement has been agreed to subject to this condition." As one of the things thus prescribed, viz., the effecting of the sub-division has not been fulfilled, the plaintiff is not entitled to rely on the document as an acknowledgment. The recent decision of the Judicial Committee in *Maniram v. Seth Rupchand*(1), to which we drew attention in the course of the argument, is decisive on the point. Though so far as the specific cases provided for in the explanation to section 19 of the Limitation Act are concerned, the Indian is not the same as the English Law, yet there can be no doubt that here as well as in England an acknowledgment of a conditional liability such as the present would not give a fresh start so long as the condition remains unfulfilled. "The question" observes Sir Alfred Wills in the course of the judgment "is whether a given state of circumstances falls within the natural meaning of a word which is not a word of art, but an ordinary word of the English language, and this question is clear of any extraneous complication imposed by the statute Law of either England or India. In a case of very great weight, the authority of which has never been called in question, Lord Justice Mellish laid it down that an acknowledgment to take the case out of the statute of Limitations must be either one from which an absolute promise to pay can be inferred, or, secondly, an unconditional promise to pay the specific debt, or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed. *Re. River Steamer Co., Mitchell's claim*(2).

The Indian Limitation Act, however, says nothing about a promise to pay and requires only a definite admission of liability as to which there can be no reason for departing from the English principle that an unqualified admission and an admission qualified by a condition which is fulfilled stand upon precisely the same footing."

A further question was argued as regards interest. The decree is not in accordance with the judgment, as the decree allows interest on the peshkush from the date of the plaint, whereas the time in the judgment is from the 1st November 1898. The decree

(1) I.L.R., 38 Calo., 1047.

(2) L.R., 6 Ch., App. 822 at p. 828.

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will be modified in this respect, and in other respects confirmed. Subject to the above modification Appeal No. 22 is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice S. Subrahmania Ayyar and Mr. Justice Benson.

1906.
July 18, 18,
19.

ALAGAPPA CHETTY (PLAINTIFF), APPELLANT,

v.

CHIDAMBARAM CHETTY AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Merchant Shipping Act, 57 and 58 Vict., Chap. 60, ss. 24, 57—No bill of sale necessary where vendor sells only equitable interest.

The purchaser of an equitable interest in a ship can sue to establish his right to such interest and the income thereof without a registered bill of sale.

Section 24 of the Merchant Shipping Act of 1894, which makes a bill of sale compulsory, does not apply to transfers of equitable interests which are governed by section 57 of the Act.

Ramanadan Chetti v. Nagooda Maracayar, (I.L.R., 21 Mad., 395), dissented from.

Chasteauneuf v. Capeyron (L.R., 7 A.C., 127), followed.

SUIT for a declaration that the plaintiff was entitled to a one-fourth share of a ship and the income thereof. The plaintiff claimed as the purchaser of the first defendant's one-fourth share in the ship. It was not alleged that the sale was effected by a bill of sale. The plaintiff ship admittedly belonged to defendants Nos. 1 to 3 and was registered in the name of the fourth defendant, to whom the plaintiff alleged that the first defendant had sold his share *benami* to effect the registration, the first defendant remaining the beneficial owner of such share.

The defendants pleaded *inter alia* that the sale to the plaintiff not being effected by a bill of sale as required by section 24 of the Merchant Shipping Act, was not valid and enforceable.

* Appeal No. 63 of 1903, presented against the decree of M.R.Ry. W. Goplachariar, Subordinate Judge of Madura (East), in Original Suit No. 44 of 1902.

The Subordinate Judge held, on the authority of *Ramanadan Chetti v. Nagooda Maracayar* (1) that the sale to the plaintiff was inoperative as there was no bill of sale and dismissed the suit.

Plaintiff preferred this appeal.

P. R. Sundara Ayyar and T. Rungaramanuja Chariar for appellant.

V. Krishnaswami Ayyar and K. Srinivasa Ayyangar for first, third, fourth and fifth respondents.

JUDGMENT.—In this case the suit was dismissed without trial on the ground that the plaintiff, upon the allegations in his plaint, was not entitled to rely on his alleged right to a share of the ship referred to in the plaint in consequence of the provisions of the Merchant Shipping Act of 1894 (57 and 58 Vict., Chapter 60). The ship in question was owned in shares by the defendants Nos. 1, 2 and 3 and the brother of the first defendant. The ship is registered under the Act in the name of the fourth defendant, who, however, has no proprietary interest in the vessel, being merely the agent of defendants Nos. 2 and 3. The plaintiff claims to have purchased from the first defendant his one-fourth share of the ship. There was no bill of sale, nor any registry in the name of the plaintiff. He sues for a declaration of his right to be registered, and for recovery of his share of certain profits said to have been derived from the ship. Following the decision in *Ramanadan Chetti v. Nagooda Maracayar* (1) the Subordinate Judge held that, in the absence of registration as required by section 24 of the Act, the plaintiff was disentitled to set up any right to an interest in the ship. No doubt that case supports the view taken by the Subordinate Judge, but in the present case we allowed the question of the soundness of that view to be argued as it appeared that certain authorities opposed to that view were not cited or considered by the Court. In that judgment it was assumed that the case of *Ward v. Beck* (2), which was decided in 1863, was a decision under the Merchant Shipping Act of 1854, as modified by the Act of 1862, and that it therefore applied the decision in *The Liverpool Borough Bank v. Turner* (3) which was a decision under the Act of 1854, prior to amendment to the provisions of the Act as it stood after the Act of 1862 was passed.

(1) I.L.R., 21 Mad., 395.

(2) 32 L.J.C.P., 118.

(3) 29 L.J.Ch., 827.

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The transaction which was in question in *Ward v. Beck*(1) was, however in fact, a transaction governed by the Act of 1854 before the amendment enacted in 1862. The references to the amendments introduced in 1862 made by Willes, J., in the course of his judgment were only by way of argument in support of the view which he held as to the true construction of the Act of 1854 with reference to the matter in dispute before him.

In these circumstances neither *Ward v. Beck*(1), nor the case in *Ramanadan Chetti v. Nagooda Maracayar*(2) can be relied on with reference to the construction of the present Act, which contains new provisions admitting of the recognition of equitable interests including those arising under contract. Section 57 of the Act declares that the intention of the Act is that "interests arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interest therein in the same manner as in respect of any other personal property" without prejudice, however, to three classes of cases specified in the section, no one of which has any application to the present case. It is not necessary for us to discuss the decision of Grove, J., in *Batthyany v. Bouch*(3) in which the learned Judge dissents from the earlier decision of Wood, V.C., in *The Liverpool Borough Bank v. Turner*(4) already referred to, since the matter, so far as the Courts in India are concerned, is practically concluded by the observations of the Judicial Committee in the case of *Chasteauneuf v. Capeyron*(5). The Judicial Committee there dealt with the Act as amended in 1862 and after referring to the state of the law up to the decision in *The Liverpool Borough Bank v. Turner*(4), they point out that the law had been altered by the amendment made in 1862 and that the effect of the amendment was to allow the recognition of equitable interests, subject only to the three classes of cases specifically excepted by the Act. The provisions of the Act of 1894, now in force, are practically identical, so far as concerns the present case, with the provisions of the law which the Judicial Committee had before them.

In the present case if the plaintiff's allegations are true, the interest of his vender was only equitable, and it is competent to

(1) 32 L. J.C.P., 113.
(3) 50 L. J.Q.B., 421.
(5) L.R., 7 A.C., 127.

(2) I.L.R., 21 Mad., 395.
(4) 29 L.J. Ch., 827.

him to establish his alleged right to the share in the ship and its income without any registered bill of sale.

We therefore set aside the decree of the Subordinate Judge and remand the case for disposal according to law. Costs in this Court will be provided for in the decree of the lower Court.

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APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Subrahmaniam
Ayyar and Mr. Justice Benson.

SUSYA PILLAI (PLAINTIFF), APPELLANT,

1908.
July 17, 20.

v.

AIYAKANNU PILLAI AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Limitation Act XV of 1877, sch. II, arts. 175 (e), 178—Article 178 applies to applications to bring in representatives of deceased respondent in second appeals—Civil Procedure Code Act XIV of 1882, ss. 582, 587.

The reference to section 582 of the Code of Civil Procedure in article 175 (e) of schedule II of the Limitation Act does not include by implication second appeals referred to in section 587 of the Code of Civil Procedure.

The period of limitation for bringing in the representative of a deceased respondent in a second appeal is not that prescribed by article 175 (e) of schedule II of the Limitation Act, but that prescribed by article 178.

Lakshmi v. Sri Devi, (I.L.R., 9 Mad., 1), followed.

Vakkalagadda Narasimham v. Vahisulla Sahib, (I.L.R., 28 Mad., 498), overruled.

THE facts necessary for the purpose of this report are sufficiently stated in the judgment.

K. Ramachandra Ayyar for V. Krishnaswami Ayyar for appellant.

T. V. Seshagiri Ayyar for seventh and eighth respondents.

JUDGMENT.—The first question for determination is whether the application made on behalf of the appellant on the 28th September 1903 to substitute for the first respondent who died on

* Second Appeal No. 380 of 1902, presented against the decree of H. G. Joseph, Esq., District Judge of Trichinopoly, in Appeal Suit No. 71 of 1901, presented against the decree of M.B. Ry. S. Doraswami Ayyar, District Munsif of Trichinopoly, in Original Suit No. 350 of 1896.

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the 2nd October 1902, the fourth, fifth and sixth respondents as his representatives, is time barred.

It is contended that the application is governed by article 175 (e) of schedule 2 of the Limitation Act and therefore time barred, not having been made within six months of the death of the first respondent. Being an application presented in a second appeal it is not strictly made under section 582, Civil Procedure Code, and therefore it is not within the language of article 175 (e). The application is one which is made by virtue of section 587, Civil Procedure Code, which renders the chapter in which section 582 occurs applicable to second appeals.

It is argued that the reference to section 582 in article 175 (e) should be held to include by implication second appeals referred to in section 587, but this contention is opposed to the *ratio decidendi* of the Full Bench decision in *Lakshmi v. Sri Devi*(1) which has been followed by all the other High Courts. *Debi Din v. Chunna Lal*(2), *Balkrishna Gopal v. Bal Joshi Sadashiv Joshi*(3), and *Udit Narain Singh v. Harogowri Prosad*(4). The case of *Vakkalagadda Narasimham v. Vahizulla Sahib*(5) is in direct conflict with the principle on which the Full Bench proceeded, and which in our opinion, must be adopted as correct.

The case therefore is one which is governed not by article 175 (e), but by the general article No. 178, and overruling *Vakkalagadda Narasimham v. Vahizulla Sahib*(5) we hold that the application is not time barred. On the merits we are of opinion that the decision of the District Court cannot be sustained. Assuming that the finding of the District Judge that the oral agreement said to have been entered into by the first defendant with Palani Andi through whom the plaintiff claims is a good finding, it is difficult to see how that could prevent the plaintiff being permitted by the Revenue authorities to irrigate the 3½ acres mentioned in the plaint with Government water flowing in the channel in question.

There is no allegation or proof that the irrigation rights of any of the respondents in regard to the lands in their holdings are injuriously affected by the permission granted to the plaintiff.

(1) I.L.R., 9 Mad., 1.
(3) I.L.R., 10 Bom., 663.
(5) I.L.R., 28 Mad., 498.

(2) I.L.R., 10 All., 264.
(4) I.L.R., 12 Calc., 590.

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The plaintiff is therefore entitled to have a declaration of his right to irrigate the above land on the terms and conditions set out in the order, exhibit L of the Divisional officer granting the permission and the respondent will be restrained from interfering with such right. We reverse the decree of the lower Appellate Court and give the plaintiff a decree as above stated with Rs. 75 for damages payable by defendants Nos. 1 to 3 and with costs in this and in the lower Appellate Court.

The estate of the first defendant will be liable for the cost and damages due by him.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

KOLA VENKATANARAYANA (PLAINTIFF), APPELLANT,

v.

VUPPALA RATNAM AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act IV of 1882, s. 58—Mortgage by conditional sale—Whether sale or mortgage to be ascertained from whole instrument—Transfer of interest need not be in express terms—"Meddatu Krayam" meaning of.

The question whether a document operates as a mortgage, or as a conditional sale must be determined on a consideration of the whole document.

The mere description of the document as "Meddatu Krayam" is not conclusive.

The transfer of interest necessary to create a mortgage need not be in express terms. It is sufficient if the instrument taken as a whole operates to create such a transfer.

SUIT to redeem lands. The deceased father of the plaintiff executed in favour of the deceased father of the defendants in 1877, a document, the material portions of which were as follows:—

"Conditional deed of sale executed and given on Tuesday the 7th Ashadha Suddha of the year Easwara corresponding to 17th July

* Second Appeal No. 1357 of 1904, presented against the decree of F. H. Hamnett, Esq., District Judge of Godavari at Rajahmundry, in Appeal Suit No. 547 of 1903, presented against the decree of M.R.Ry. D. Raghavendra Row, District Munsif of Rajahmundry, in Original Suit No. 347 of 1902.

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1877 in favour of Vuppala Jagannadham by Kola Dorayya. The amounts I borrowed from you on account of my need are :—

RS. A. P.

150 0 0 Principal mentioned in the stamped deed, dated 20th August 1876.

24 12 0 Interest due at Rs. 1-8-0 per cent. per mensem on 1650 Dokadas due therefor for 11 months.

225 4 0 Cash received this day on account of my son's marriage.

400 0 0 Four hundred rupees. Interest herefor is at Rs. 1-8-0 per cent. per mensem.

I shall pay the said principal and interest on the 7th Ashada Suddha of the year Pramadi (26th June 1879) and take back this bond. If I fail to pay accordingly on the due date my dry land mentioned in zeroyati garvu patta, I shall give up to you treating the principal and interest hereof as sale-proceeds. Should I pay down the amount before the due date, I shall only get the payment endorsed on the back of this bond, and shall not plead that I have made payment in any other manner."

The plaintiff alleging that the document created only a mortgage of the lands instituted this suit for redemption. The defendants pleaded *inter alia* that the transaction was a conditional sale and not a mortgage.

The District Munsif held that the document evidenced a sale and not a mortgage and dismissed the suit. His decree was confirmed on appeal by the District Judge.

Plaintiff preferred this second appeal.

V. Krishnaswami Ayyar for appellant.

The Hon. Mr. P. S. Sivaswami Ayyar for first to third respondents.

C. Venkatasubbaramiah for third respondent.

JUDGMENT.—In this case we are unable to adopt the view of the Courts below as to the construction of exhibit A. We are of opinion that it operates as a mortgage by conditional sale. The question is not governed by the provisions of the Transfer of Property Act, but we are entitled to look to the provisions of that enactment with a view to determining the legal effect of the instrument in question. Section 58 specifies three instances of mortgages by conditional sale. One of these is where the mortgagor ostensibly sells the mortgaged property on condition that on

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default of payment of the mortgage money on a certain date, the sale shall become absolute. It seems to us that the instrument in question falls within the words of this definition. The document is described as "Meddatu Krayan." These words are defined in Wilson's Glossary as "land mortgaged with option to the lender to consider it as his property if the mortgage is not redeemed within a stipulated period." The use of the words is, of course, not conclusive, but we think that, taken in conjunction with the other provisions in the instrument, their effect is to render the document a mortgage and not, as the Courts below have held, a sale on a condition.

It was contended that the instrument is not a mortgage, since it does not transfer an interest in immovable property. It is true, it does not transfer such an interest in terms, but the question is not 'is there such a transfer in express terms'—but does the instrument, taken as a whole, operate as such a transfer."

The case of *Butchiraju v. Ramalinga Murty*(1) may be distinguished on the ground that the document there in question is not described as "Meddatu Krayan."

We are of opinion that the deed is a mortgage. The decrees of the lower Courts will be set aside and there will be a decree for redemption on payment of Rs. 544. Four months will be allowed for redemption. The appellant is entitled to his costs throughout.

(1) 14 Mad. L.J., 337.

APPELLATE CIVIL.

Before Mr. Justice Subrahmaniam Ayyar and Mr. Justice Benson.

GANAPATHI AYYAR AND OTHERS (DEFENDANTS
Nos. 18, 5 AND 4), APPELLANTS,

v.

SRI VEDAVYASA ALASINGA BHATTAR AND OTHERS
(PLAINTIFFS NOS. 1 TO 4 DEFENDANTS, 7 TO 10 AND
11 TO 13), RESPONDENTS.*

1906.
March 12,
13, 14, 16.

Madras Regulation VII of 1817, s. 13—Board of Revenue may appoint hereditary trustees—Religious Endowment Act XX of 1863—Committee appointed under, cannot interfere with existing scheme except for just and sufficient cause—Act does not confer arbitrary power to appoint additional trustees.

It is competent to the Board of Revenue under section 13 of Madras Regulation VII of 1817 to appoint hereditary trustees when such appointment does not interfere with any subsisting rights. Such appointment is not inconsistent with the exercise of superintendence by the Board, and the Board does not thereby relinquish a part of the duty of superintendence vested in them by section 2.

Venkatesa Nayudu v. Shrivani Shatagopa Shri Shatagopaswami, (7 M.H.C.R., 77), approved.

Appasami v. Nagappa, (I.L.R., 7 Mad., 499), referred to.

The Board cannot arbitrarily put an end to an arrangement permanently made by them, but may do so only for just and sufficient reasons. It is not competent to a Temple Committee, under Act XX of 1863, to alter the constitution of the temple management established by the Board and to appoint additional trustees where some or all of the trustees are hereditary. Act XX of 1863 does not confer on the committee an unqualified power of adding to the number of trustees sanctioned under an existing scheme even if such trustees are not hereditary.

Such an addition may be made only for just and sufficient cause which should be fully stated in the Proceedings of the Committee. The negligence or mismanagement of old trustees or any pecuniary benefit to the temple by the new appointments are not just and sufficient causes.

Such appointments ought not to be temporary.

THE plaintiffs and defendants Nos. 8 to 16 were the hereditary stalathars of the temple of Srirangam. Defendants Nos. 3 to 7 were members of the Temple Committee, Trichinopoly taluk, in

* Second Appeal No. 105 of 1904, presented against the decree of L. G. Moore, Esq., District Judge of Trichinopoly, in Appeal Suit No. 141 of 1902, presented against the decree of M.R.Ry. A. Sambamurthi Ayyar, District Munsif of Srirangam, in Original Suit No. 156 of 1900.

which the said temple was situate. Defendants Nos. 1 and 2 were additional trustees appointed by the Committee in 1899.

The Board of Revenue in 1842 arranged that the management of the temple should be conducted by one trustee taken from the four families of the stalathars (each family furnishing a trustee by rotation), and two other permanent trustees (not hereditary) appointed to co-operate with the hereditary trustees.

The temple was managed under this scheme until December 1899, when the defendants Nos. 3 to 7 appointed two additional trustees, defendants Nos. 1 and 2, temporarily, to take part in the management of the temple. The plaintiffs sued to set aside the appointment of the two additional trustees on the ground that it was an infringement of their rights, and that such appointment was illegal and prejudicial to the temple.

The District Munsif held that the committee had power to increase the number of trustees and that the stalathar trustees were not hereditary trustees. He dismissed the plaintiffs' suit.

On appeal this decree was reversed and the plaintiffs' claim decreed with costs.

Defendants Nos. 4, 5 and 18 preferred this second appeal.

The Hon. Mr. P. S. Sivaswami Ayyar for T. Rangachariar for appellants.

Sir V. Bhashyam Ayyangar for second and fourth respondents.

N. Rajagopalachariar for first to fourth respondents.

P. R. Sundara Ayyar for second respondent.

JUDGMENT.—The question in this case is whether the appointment by the Temple Committee of defendants Nos. 1 and 2 as temporary additional trustees of the Srirangam temple is valid?

The scheme of management which was in existence at the time of the appointment in question was one that had been sanctioned in 1842 by the Board of Revenue in pursuance of the policy then adopted under the order of the Court of Directors with a view to the withdrawal of Government interference with the executive management of temple affairs. Under the orders of the Board of Revenue, dated the 6th October 1842, the management of the temple was entrusted to two trustees who were otherwise unconnected with the temple, and to the body of mirasi office holders in the temple, known as stalathars. As there were four families of stalathars it was arranged that one stalathar should act with the other trustees by yearly turns, such acting stalathar representing

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the whole body and conducting his duties in consultation, if necessary, with them.

We agree with the District Judge that the stalathar trustees were hereditary trustees. In the Proceedings of the Board of Revenue they are referred to as *ex-officio* trustees, and as already stated, their right to the office of stalathar is permanent and hereditary. The first objection taken by the vakil for the appellants is that it was not competent to the Board of Revenue to invest any body of persons with an hereditary right to the trusteeship. We are unable to accept this contention. At the time when the scheme was introduced it does not appear that any one possessed any right which would be interfered with by the scheme of the Board. The case was one in which it was competent to the Board of Revenue under section 13 of Regulation VII of 1817 to make "such provision for the trust, management or superintendence as may to them seem right and fit, with reference to the nature and conditions of the endowment." Mr. Sivasawmy Ayyar's argument was that, under section 2 of the Regulation, the superintendence of the temples was vested in the Board of Revenue, and that for the Board to create a body of hereditary trustees was to renounce a part of their duty under the section, and was therefore improper and illegal. But it is undoubted that the power of superintendence provided for by this section was not confined to institutions where the trustees were not hereditary, and, therefore, there is no necessary inconsistency between the exercise of the superintendence contemplated by that section and the existence of hereditary trustees, whether appointed by the Board or otherwise existing. The question really turns upon the effect of section 13. The words of that section already quoted are wide and general, and, if in the opinion of the Board, it was desirable to introduce an hereditary element into the management of the temple, we can see no objection to their having done so. The ritual and other details connected with the worship in the temple are matters with which the management would properly concern itself.

Consequently the association of important hereditary office-holders of the temple with other persons as trustees was obviously for the advantage of the institution. Our opinion that the Board of Revenue did not exceed its powers in making such an arrangement is supported by the decision in *Venkatesa Nayudu v.*

Shriean Shatagopa Shri Shatagopaswami(1). We are unable to agree in the doubts thrown on the decision in *Appasami v. Nagappa*(2). By the mere fact that one of the trustees was made hereditary, there was no relinquishment of the control vested in the Board by the law.

Mr. Sivaswami Ayyar's next contention was that, even if the Board were competent to make the scheme, it did for the management of the temple, it was open to them to revoke it, and that as the powers of the Board passed to the Temple Committee under Act XX of 1863, the committee might make any changes they liked in the existing scheme, and their present action therefore cannot be questioned. We cannot agree with the suggestion that it was competent to the Board of Revenue to arbitrarily put an end to arrangements permanently made by them. Interference with a scheme so made could only be for good and sufficient reasons connected with the interests of the institution, and any interference would be unwarranted so long as the scheme permanently introduced was at work without any default on the part of the managers or so long as there was no change of circumstances rendering an alteration of the scheme necessary. The assumption that an authority empowered by law to introduce a scheme of management in respect of public institutions is necessarily at liberty at its mere will and pleasure to set aside the scheme once introduced is unfounded,—such power will exist only if specifically given. The real point for consideration is whether the committee had power to alter as they did the constitution of the temple management regularly established by the Board.

The case of *Sheik Davud Saiba v. Hussein Saiba*(3) is an authority to the contrary. The Court there laid down that a committee cannot appoint additional trustees where there is an hereditary trustee. We are unable to accept the suggestion that the Court there intended to restrict this view to cases where there is a sole hereditary trustee, or to cases where all the trustees are hereditary. On this ground alone the appointments in question should be held invalid. Even apart from this, we think that the appointments cannot be supported. We cannot accept the contention that the committee has an unqualified power of adding

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(1) 7 M.H.C.R., 77.

(2) I.L.R., 7 Mad., 499 at p. 509.

(3) I.L.R., 17 Mad., 212.

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to the number of trustees sanctioned under an existing scheme even if the trustees be not hereditary. The case of *re Burnham National Schools*(1) is no authority against this view. In that case the Charity Commissioners were by statute empowered to exercise the powers of the Court of Chancery, and there is clearly no analogy between the powers of such a body and the committee appointed under Act XX of 1863 which gives no such powers. It is scarcely necessary to say that the appointment of additional trustees does not necessarily add to the efficiency of the body, and in many cases it might make the body unwieldy. The proper view, in our opinion, is that the committee's power in the matter can only be exercised for good and sufficient cause. The reason for this conclusion is substantially that which warranted this Court many years ago in holding that the committee is entitled to remove a trustee only for good and sufficient reasons, viz., that otherwise the rights and powers of trustees would be improperly interfered with. It is obvious that the appointment of additional trustees would have the effect of modifying the powers and responsibilities of the existing trustees. We may add that the grounds on which the addition of trustees was resolved on do not appear to have been fully and clearly stated in the Proceedings of the Committee, as they should be in the case of a public body such as this is. So far as can be gathered from the order of appointment issued to the new trustees there was alleged to be negligence and mismanagement on the part of the old trustees. Assuming that there were grounds for this statement it seems to us, as urged on behalf of the plaintiffs, that the proper remedy is not by the appointment of additional trustees, but by enquiring into the charges and by the removal, if necessary, of the defaulting trustees and the appointment of others in their places. It also appears that one inducement for the appointment of the new trustees was an offer on their part to defray the cost of some of the repairs of the temple which it is said the old trustees had failed to carry out. Though such benefactions from those interested in the temple may properly be encouraged, we do not think that such encouragement should take the form of giving the donors a place in the established scheme of management. Another and a most serious objection to

(1) L.R., 17 Eq., 241.

the appointments is that they are altogether temporary. We are supported in this view by the opinion of Shepherd, J., in the case of *Seshadri Ayyangar v. Nataraja Ayyar*(1). It is manifest that to lay down that the committee has an unqualified power of making temporary appointments would give them a power liable to grave abuse. Such temporary managers would be merely servants removable at the will of the committee, and would serve to give the committee a control over the management inconsistent with the policy of Act XX of 1863, viz., that the actual administration of affairs should be in the hands of the trustees subject only to the supervision of the committee.

We therefore agree with the District Judge and dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmaniam Ayyar and Mr. Justice Miller.

MAHAMAHOPADYAYA RANGACHARIAR (PLAINTIFF),
APPELLANT,

1906.
August 13,
14, 15, 28.

THE MUNICIPAL COUNCIL OF KUMBAKONAM
(DEFENDANT), RESPONDENT.*

District Municipalities Act (Madras)—Act IV of 1884, ss. 4-B (1) (b), 4-B (3) (b) 21, 261—Supersession of a municipal body under s. 4-B (1) (b) only a suspension—No notice under s. 261 required when the suit is only for injunction—Easements Act V of 1882, s. 7, ill. (a) and (i)—Right of proprietor on higher level under s. 7, ill. (i), not an easement and does not interfere with the right of lower proprietor to build on his own land under s. 7, ill. (a).

The 'supersession' of a Municipal Council under section 4-B (1) (b) of Madras Act IV of 1884 is only a suspension of such body for a limited period and such supersession is different from and has not the effect of a dissolution under section 4-B (1) (a). The 'reconstitution' of such a Council under section 4-B (3) (b) is the revival of the old corporation and not the creation of a fresh one, and all the rights and liabilities of the superseded Council will devolve on the Council so reconstituted as its rightful successor.

(1) I.L.R., 21 Mad., 179.

* Second Appeal No. 963 of 1903, presented against the decree of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 978 of 1902, presented against the decree of M.R.Ry. P. Narayanachariar, District Munsif of Kumbakonam, in Original Suit No. 60 of 1901.

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The notice required by section 261 of the District Municipalities Act is not necessary when the suit is for an injunction.

The right of the owner of higher land under section 7, illustration (a), of the Easements Act, i.e., that the water naturally rising in, or falling on, such land, shall be allowed by the owner of adjacent lower land to run naturally thereto is not a right in the nature of an easement and is subject to the right of the owner of such lower land to build thereon under section 7, illustration (a), of the Act.

The owner of the lower land cannot complain of the passage of such water as an injury, but he is not bound to keep open such way and may obstruct it by suitable erections on his land.

Smith v. Kenrick, (7 C.B., 315), referred to.

Rylands v. Fletcher, (L.R., 3 H.L., 338), referred to.

Suit for damages and perpetual injunction. The plaintiff was the owner of certain land in Kumbakonam which was on a lower level than a road which bounded it on one side. To prevent the water collected in the road from flowing over his land the plaintiff put up a ridge between his land and the road. The servants of the defendant, the Municipal Council of Kumbakonam, cut the ridge under the orders of the defendant and the water flooded the plaintiff's land. The plaintiff instituted this suit to recover Rs. 10 as damages for the flooding of his land and asked for a perpetual injunction to restrain the defendant from similar acts.

The defendant pleaded *inter alia* that the suit so far as the injunction was concerned was not sustainable for want of notice under section 261 of the District Municipalities Act; and that the defendant had a prescriptive right to discharge the water over the plaintiff's land.

The District Munsiff held that no notice was necessary, that the defendant had failed to make out a prescriptive right, and accordingly passed a decree in the plaintiff's favour.

The District Judge on appeal held that notice was necessary and that the defendant had, on account of the higher level of his land, a right by way of natural easement, under section 7, illustration (a), of the Easement Act to discharge the water on to the plaintiff's land, and, as the plaintiff had not shown that the defendant had lost such right by disuse, his suit must fail. He accordingly dismissed the suit. The plaintiff preferred this second appeal.

The appeal was preferred on the 27th July 1903. Before it came on for hearing, the Municipal Council was superseded for

seven months ending on 31st March 1906 by notification, dated 29th August 1905, under section 4-B (i) (b) of the Act and the Council was reconstituted after the period of supersession.

An objection was taken on this second appeal that the appeal could not be prosecuted against the reconstituted Council.

The Hon. Mr. P. S. Sivaswami Ayyar for V. Krishnaswami Ayyar and K. Sreenivasa Ayyangar for appellant.

P. R. Sundara Ayyar for respondent.

JUDGMENT (SUBRAHMANYA AYYAR, J.).—This case was argued fully and ably on both sides. The important questions for determination are:—

(1) Whether this second appeal cannot be prosecuted by the appellant as against the present Municipal Councillors;

(2) Whether the suit, in so far as the prayer for injunction is concerned, is unsustainable for want of notice under section 261 (1) of the Madras District Municipalities Act; and

(3) Whether the appellant was disentitled to raise the ridge put up by him on his own land adjoining the highway vested in the Municipal Council for the purpose of preventing water on the surface of the highway finding its way on to his land by gravitation.

Now as to the first question, by the notification of the Government, dated the 29th August 1905, issued under section 4-B (1) (b) of the District Municipalities Act (Madras Act IV of 1884), the Municipal Council of Kumbakonam, then existing, was superseded for a period of seven months till the 31st March 1906. Subsequently, Councillors were appointed or elected for the Municipality and they entered on their duties after the expiry of the period of supersession. Mr. Sundara Ayyar for the Council-lers contended that the present suit, which had been instituted against the superseded Council, necessarily terminated on the supersession taking place, having regard to the definition of "Municipal Council" in section 3 (xv) of the District Municipalities Act and to section 21 of the same Act which makes every Municipal Council a body corporate. In other words, he urged that the corporation that subsisted up to the date of the supersession became thereafter completely extinct, and that the Councillors who took office subsequent to the expiry of the period of supersession constituted a fresh corporation which cannot be proceeded against for the damages stated to have been caused by,

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or the injunction claimed on account of, what had been done by the superseded Council, the alleged cause of action being purely personal in reference to that body. It was argued that, though the idea of a corporation implies something more than the group of natural persons with reference to whom the corporate character is predicated, the corporation cannot be taken to subsist when that group has been completely broken up, and that the provisions of the District Municipalities Act relating to supersession are only consistent with this view. The difficulty of formulating a theory as to the true nature of a corporation that would satisfy minds bent upon probing the matter from more than a practical point of view will be found well suggested in the recent brilliant paper of Prof. Maitland on 'Moral Personality and Legal Personality' in Number 14 of the Journal of the Society of Comparative Legislation. It seems to me that in discussions like the present we may not unprofitably turn for light to the rules of English Law relative to corporations, even taking that that law has, as the learned writer humorously put it, been muddling along with semi-personality and demi-semi-personality towards convenient conclusions prompted by its characteristic sound instincts. The subject of abeyance of fictitious personality will be found discussed in Grant on Corporations in the chapter on "dissolution." At page 301 cases analogous to the present are considered and the author states the following propositions as deducible from the authorities:—

"That the misuse or abuse of only some of the legal attributes of a corporation or the usurpation of fresh liberties, etc., are either of them, when proved, ground for a judgment of seizure of all the liberties, etc., and therefore of the removal from the corporators, during the pleasure of the Crown, of the corporate character in all its parts.

"That such seizure does not operate to dissolve a corporation but only to suspend its regular operation during the pleasure of the crown.

"That judgment of ouster of all the corporators upon information against them does not dissolve the corporation but only suspends its operation.

"That in either of the two last cases the corporation may be revived by a new charter which operates by relation, so as to make the new body in all respects identical with the old one as

"regards prescription, choses in action, rights of common, etc., and also as regards debts, liabilities, etc., and the same of a writ of restitution.

"That the usual practice upon seizure has been for the crown to appoint a custos who appears of himself to have discharged all the functions, duties, etc., of the corporation until the restitution of the liberties or revival of the corporation."

A possible objection on theoretical grounds to the doctrine of dormancy is met by the learned author thus:—

"In fact there seems to be a difficulty in reconciling the doctrine of dormancy or dissolution for some purposes only with strict principles of corporation law; on the other hand, however, the inconvenience of holding that a corporation in such circumstances is wholly dissolved—so that their leases would be disturbed because the lands themselves would revert to the original owners, lands given for charitable purposes would be lost, persons having debts due to them from the corporators could not recover them, the corporators would lose their rights of common, etc.,—is manifestly so great that the doctrine, though it has been treated lately with some degree of doubt, must probably be considered as almost established, and that such a revival operates by relation so as to prevent the destruction of prescriptive rights vested in the corporation, and not to interfere with the operation of statutes of limitation either for or against them."

Now turning to our enactment, that it has not departed from, but has, so far as it goes, followed this doctrine of dormancy is, by its provisions, made abundantly clear. Section 4-B (1) (a) empowers the Government to cancel the notification constituting a Municipality and to dissolve the Municipal Council when it sees fit to do so. The consequence in such a case, of course, is a total annihilation of the corporation, and under sub-section 2 of the same section the funds till then available for the purposes of the abolished Municipality are at the absolute disposal of the Government. The provisions as to supersession, which term, by the very contrast involved in its use here as distinguished from dissolution, implies a radically different thing, are framed naturally on quite other lines. No doubt the Municipal Councillors holding office at the time of the supersession cease to do so altogether. But the Municipality itself is left intact, the management of its affairs has

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to be provided for by the appointment of a person or persons to be chosen by the Governor in Council and, though the property held by the Councillors is, during the supersession, vested in the Governor in Council, that is so only in trust for the purposes of the Municipality concerned, as section 4-B (3) (a) (iii) must be read along with section 27. To put it otherwise, supersession is nothing more than the dismissal of incompetent Councillors, followed only by the appointment of, to borrow the language of the English law, a *custos* for the discharge of the functions of the Council pending the nomination or election of other persons who would resume work in the normal way. In a word, supersession is but a suspension of the Council. A clear argument suggested by the section itself against the contrary view is this: The former of the provisions just mentioned does not give the Governor in Council power to transfer the property vested in him during the supersession to the reconstituted Municipal Council. And as sections 23 and 24 are limited to the cases of streets, roads, etc., property other than these, taken by the Governor in Council during the supersession would, for want of a provision on the point in the Act, not pass to the reconstituted Council if that were an entirely new creation. And as the Governor in Council takes the property only during the time of the supersession, there cannot be implied in him any power to make a transfer that could operate after that period. The result of this view is the loss of such property to the Municipality which, of course, could not have been intended. Nor could the subject of what is to become of property of this description after the expiry of the period of supersession have been overlooked by the draftsman, considering that, by one of the clauses already referred to in the same section, he has provided for the disposal of the property in the event of a dissolution. The only reasonable view then is that he took it that the provision that the property shall vest in the Governor in Council during supersession only, implied, as it undoubtedly does, that thereafter it devolves by operation of law on the resuscitated Council as the rightful successor of the superseded council.

As regards the word "reconstituted" in section 4-B (3) (b), on which Mr. Sundara Ayyar laid great stress, it has, in the context, reference to the authorities or persons concerned taking steps for the appointment or election of Councillors who are to fill the vacancies caused by the supersession, and, "to appoint"

is one of the acceptations in which "constitute" is, as a word of the English language, used.

I therefore overrule the contention I have been considering and hold that the plaintiff is entitled to proceed with the case as against the existing Council.

Next, as regards the question of notice, I may deal with it quite shortly. Suits referred to in clause (1) of section 261 are, by its very terms, those which relate to acts "done or purporting to be done," whereas, a claim for an injunction is with reference to what it is apprehended will be done in the future. It would not be right to impute to the Legislature an intention to insist upon the lapse of the interval involved in the provision as to notice even in regard to cases where such lapse might be attended with the completion of the threatened injury, the prevention of which is the very aim and end of the suit—*cf. Kirk v. Todd*(1).

This objection also therefore fails.

I now pass on to the third and last question. The arguments on behalf of the Councillors as to this were rested on the right enunciated in illustration (i) to section 7 of the Indian Easements Act, which is as follows:—

"The right of every owner of upper land that water naturally "rising in, or falling on, such land and not passing in defined "channels, shall be allowed by the owner of adjacent lower land, "to run naturally thereto."

That this rule is as well settled as any rule of law relating to incidents of ownership of immoveable property goes without saying. The point is whether the consequence which Mr. Sundara Ayyar has sought to derive from the rule follows. In other words is the owner of lower land precluded from preventing "water naturally rising or falling" on the adjacent higher close from coming on his own, by an act which is no more than a natural user of his own property? For example, if the proprietor of a lower plot of ground situated in a town (as in the present instance) erects a house with the result that the wall thereof throws back the water which otherwise would have passed by gravitation thereon, has he thereby rendered himself liable to an action at the instance of his neighbour? In my opinion, no. Even were the question bare of authority I should have no hesitation in holding

(1) L.R., 21 Ch.D., 434.

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as I do for the simple reason that the right spoken of in illustration (i) is not to be understood as overriding the right, for instance, recognised in illustration (a) to the same section, viz., to build on the land subject only to any Municipal law for the time being. Each of these rights is, of course, exercisable by its owner; but when the two come in conflict that which has of necessity to yield must go altogether or accommodate itself as best it can according to circumstances. The right put in illustration (i) is, in short, a right only in the sense that the passage of water from the higher to the lower close gives no right of action to the owner of the latter, that being but the result of the operation of the laws of nature.

No doubt in this sense the right is precarious, but let us see what the other view would lead to. Suppose that the owner of Blackacre, which is contiguous to, and on the same level with Whiteacre, is, in the course of agricultural improvements effected by the owner, raised in level so as to make surface water thereon pass off into Whiteacre. Is the latter to remain subject to the burden of receiving such water unless and until a change in the condition of the two properties is brought about by natural agencies? Can the owner of Whiteacre in order to prevent his land being placed under such a disadvantage restrain by action the owner of Blackacre from raising its level? Suppose again these properties are situated in a town and that Blackacre is acquired by the Municipal authorities to be laid out as a road, the road being of a higher elevation than Whiteacre. Are the owners of the lots into which Whiteacre is, let us suppose, divided, to be held disentitled to build on their properties unless they provide for the drainage of surface water coming on the highway? Can they obtain an injunction restraining the Councillors from elevating the road in order to prevent their properties becoming liable to the overflow which would result from the road being raised? The answers to these questions must, if the contention on behalf of the Councillors were to prevail, be in the affirmative. Such conversion of often necessary and perfectly legitimate acts done on one's own land into causes of litigation cannot but prove intolerable. The right answers should, of course, be in the negative, the party affected by such acts being left to protect himself by a suitable alteration of, or work done on, his own property.

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Now the view of the upper owner's right urged by Mr. Sundara Ayyar would be to invest it to all intents and purposes with the character of an easement; and he did not shrink from saying that this was so. But that would be inconsistent with the spirit as well as with the language of section 7 in that, *e.g.*, the right to build enunciated in illustration (a) would be unduly restricted and the illustration itself read as if it contained the words "subject also to the right of the adjoining higher close owner, provided for in illustration (i)."

It is quite true that the term "servitude" has at times been used by authors as well as judges with reference to this right, and the Civil Law relied on to meet arguments in denial of the existence of such a right at Common Law. But to infer from these passages in the authorities that in regard to the present matter English and Indian Law on the one hand and Civil Law on the other are identical would be a misconception; for under the Civil Law owners of higher and contiguous lower lands were under a reciprocal obligation in respect of water naturally arising or coming on the higher land inasmuch as the proprietor of the latter was himself bound not to interfere with such water finding its way in the usual course on to the lower land (Domat's 'Civil Law,' section 1583); whereas according to English and Indian law no such obligation attaches to the ownership of the higher land [see illustration (g) to section 7 of the Indian Easements Act]. Nor is the use of the word "servitude" in the way referred to altogether unwarranted inasmuch as in the Civil Law, it had a very wide signification and included burdens on ownership which did not amount to easements in the sense in which this latter term is employed in the English and the Indian systems. In Roman law, whenever the enjoyment of the owner was curtailed, the property was said to be in servitude (*res servit*). When the enjoyment was in no way restricted, the property was said to be free from any servitude—to have freedom (*libertas*). In this sense, even a usufruct was as much a servitude as a right of way, both being modes of enjoyment of land in opposition to the owner (Hunter's 'Roman Law,' 2nd edition, pages 394 and 395). Certainly therefore the passages referred to, in spite of a certain want of clearness in the language occurring in one or two of the Indian decisions on the point, cannot be understood as establishing that the right enunciated in illustration (i) is virtually an easement, for none of them goes the length of saying

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that the lower proprietor is precluded from protecting himself against the flow by what he does in the natural user of his own land. The contrary, on the other hand, has been unequivocally laid down more than once. In *Smith v. Kenrick*(1) Cresswell, J., implies this throughout his judgment and particularly when he observes: "Surely, the reasonable thing is that plaintiff should leave part of his own coal to protect his own workings against the influx of water" (at page 565). Cresswell, J.'s view of the law was acted upon in *Baird v. Williamson*(2) and applied to the facts of the case there. The statement of Erle, C.J., at pages 391 and 392 is explicit. He said: "If, while the occupier of a higher mine exercises the right to get all the minerals from his land, nature causes water to flow to a lower mine, he is not responsible for this operation of nature. If the owner of the lower mine intends to guard against this operation, he must leave a barrier at the upper part of his mine to bay back the water of his higher neighbour." This proposition was accepted in the House of Lords in *Rylands v. Fletcher*(3), Cairns, L.C., expressing himself thus: "If, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature." This passage was quoted with approval by Lord Blackburn in *Wilson v. Waldell*(4) also decided by the House of Lords.

With such direct and high authorities before us, I consider it unnecessary to notice in detail the statements of law in the American works of Angell, Gould, and Farnham, to which our attention was called by Mr. Sivaswami Ayyar. Suffice it to say that, according to Farnham, the latest of these writers, the rule adopted in most of the jurisdictions in the United States is in accordance with that supported by the English opinions quoted above ('Law of Waters,' volume III, sections 890 and 891).

(1) 7 C.B., 515.

(3) L.R., 3 H.L., 338.

(2) 15 C.B.N.S., 376.

(4) L.R., 2 A.C. 95 at p. 99.

I am therefore of opinion that in removing the ridge which the plaintiff had, in the natural and perfectly legitimate user of his property, put up on his own land, the Municipal Councillors committed a trespass. Having regard to the fact that this was not the first occasion on which they did so, they should, I think, be restrained from repeating such illegal acts.

I think I ought not to omit to say that it seems quite odd that the local authority constituted for the very purpose, among others, of providing for the drainage in the town, so far as their means and circumstances would permit should persist in discharging on the plaintiff's property, not only rain water falling on the highway vested in them, but also, to say the least, sewage coming from the neighbouring houses as well as the overflow of an artificial pond in the locality which, as it were by design, they are content to receive on the highway.

I would, therefore, allow the appeal and grant a decree to the plaintiff for the sum of Rs. 10 claimed as damages and allowed by the District Munsif, and further restrain the Municipal Councillors from interfering with any work which the plaintiff, in the lawful user of his land, may construct thereon to keep off surface water arising from or coming on the high way abutting the plaintiff's land. I would make the Council pay the plaintiff's costs throughout.

MILLER, J.—I am of the same opinion. Mr. Sundara Ayyar's argument on the first preliminary question proceeds on the ground that, when all the members of an aggregate corporation die, the corporation is dissolved (2 Bac. Abr., 245). There is an absolute and total dissolution. That was so, no doubt, in the case of a Chartered Corporation in England, but it does not follow that in the case of a Municipal Council in this Presidency the same effect will follow the same cause. The Chartered Corporation totally dissolved by loss of all its members could not be revived, and its dissolution carried with it consequences "so disastrous that the English Courts have limited and doubted, though they may not have overthrown, the doctrine that a Municipal Corporation can be totally dissolved" (Dillon's 'Municipal Corporations,' 4th edition, page 246).

It is quite clear that the Legislature, in the statute which we are considering, did not intend to effect such a total dissolution. The words "supersede for a specified period" are themselves sufficient

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to prove that fact, and, in my opinion, the word "reconstitute" points in the same direction, indicating rather the revival of the former body corporate than the creation of a new one.

Ordinarily the words "supersede for a specified period" would be equivalent to "suspend"; and it is evident that they were intended here to have that signification. If the section did not expressly declare the effects of supersession, there can, I think, be no doubt that, at the end of the specified period, the former Council would revive with its former members and all its former rights and liabilities, and the property which is vested in the Governor in Council "during the period of supersession" would cease to vest in him. It is not possible, I think, as the section is worded, to hold that it was intended to create a new corporation in place of that superseded. That view would seem to involve the existence of two Councils at the same time, one revived by efflux of time, the period of supersession having expired, and the other constituted under the section.

It being then the intention of the Legislature, so far as that can be gathered from the statute, to revive the former corporation at the expiry of the period of supersession, is that intention nullified by the fact that one of the declared effects of supersession is to deprive the body corporate of all its members? I do not think so. The fact is that the comparison of the body corporate constituted under Madras Act IV of 1884 with a Chartered Municipal Corporation in England is likely to mislead. The bodies are not similar. In the case before us the corporation is a small body in whom is vested certain properties in trust for certain public uses (section 27). The body can be renewed without any act of any of its own members, by the will of the Governor in Council. The dissolution of a Chartered Corporation is complete when all its members are gone because it has no power to act or to revive itself. But the English cases show that it was found necessary to hold that, even when an integral part of the corporation, *e.g.*, the whole governing body, was lost, and the corporation could not act or renew the governing body and so was dissolved to certain purposes, a fresh charter might be granted reviving the former corporation with all its old rights, and with the old or new corporators (*cf. Rex v. Pasmore*(1) and *Mayor of Colchester v.*

(1) 3 Durn. & East, T.R., 199.

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Brooks(1)). Under our statute the body corporate is the governing body, and the analogy is incomplete: the body can be renewed by a power external to itself whenever its members fail and, in that respect, is rather analogous to a corporation sole than to a Chartered Municipal Corporation under the English common law.

That being so, there seems to be no reason why effect should not be given to the intention of the legislature and why we should not hold that the re-constituted Council is a revived corporation, revived with all its rights and liabilities, which during the period of supersession were suspended but not destroyed.

The preliminary objection therefore fails.

The second preliminary question is whether the Lower Appellate Court was right in holding that, in so far as the prayer for an injunction is concerned, the notice given to the Council by the plaintiff under section 261 of the Act was defective and insufficient.

I think it is unnecessary on this point to say more than this. Before the amendment made by Act III of 1897, sections similar to section 261 in other laws were held on general principles not to apply to suits for an injunction; and whatever be the proper construction of sub-section (3) to section 261, added by the Act of 1897, that sub-section does not seem to me to require us to hold that a suit for an injunction is now within the section.

The next question is, in effect, whether the plaintiff was bound to provide for the passing in its natural course of the drainage water standing on the road west of his garden, the road being on a higher level than the garden.

The point has been argued on the natural rights of the parties and not on the footing of the acquisition of an easement by either, and it was argued also on the footing that the water in question was not flood water accumulated by reason of any extraordinary flood, but the usual seasonal accumulation in rainy weather. In fact we have to take it that the defendant's right in question is that declared in illustration (i) to section 7 of the Easements Act, that is, it is to be taken that the water is water naturally rising in or falling on the road.

For the appellant it is contended that the right so given is not an easement but is the right to pass the surface water on to the

(1) 7 Q.B., 339.

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lower land, if the lower owner does not or cannot prevent it; in other words, it is the right of the upper owner to pass the drainage if he can, and if the lower owner does not effectually prevent the passage he cannot complain of any injury done by it to his land. The right in question is stated in the case of *Smith v. Kenrick*(1), to which my learned colleague has referred, to be based on a rule of the Civil Law to the effect that the lower owner owes a natural servitude to the upper in respect of receiving, without claim to compensation, the surface water from the upper land. The decision in that case was that it was for the lower owner, if he wished to do so, to maintain the barrier existing between the two closes and that the upper owner was not bound to leave a barrier in his own land. Between the rule of the Civil Law as there stated and the right enunciated in illustration (i) there does not appear to me to be any substantial difference, and from that case it would seem that the so-called 'servitude' does not operate to prevent the lower owner from keeping out the water from the upper land, i.e., it is not an easement over the lower land. That case, no doubt, was one where there was in existence a natural barrier between the lands of the plaintiff and the defendant, but in *Rylands v. Fletcher*(2) the Lord Chancellor stated the right of the plaintiff to be not merely to maintain but also to *interpose* a barrier for his own protection against an accumulation of water on the upper land, whether upon the surface or underground, and referred to *Smith v. Kenrick*(1) as illustrating the rule so laid down.

No Indian case has been cited directly in point. The case of *Hameedoonnissa Anundmoyee*(3) is so far against the defendant that it declares the right of the lower owner to protect his land unless it is shown that he has by his act caused substantial injury to the upper owner. We are dealing with this case on the footing that, apart from questions of damage to the upper land, the defendant claims the right to keep open the way to pass the surface water, and on that footing that case is against him.

The cases of *Subramaniya Ayyar v. Ramachandra Rau*(4), and *Abdul Hakim v. Gonesh Dutt*(5), were cases of obstruction to a watercourse and consequent injury to owners of land above the

(1) 7 C.B., 575.

(3) 1864, Special Number of W.R., 25.

(4) I.L.R., 1 Mad., 335.

(2) L.R., 3 H.L., 338.

(5) I.L.R., 12 Calo., 323.

obstruction; and the case of *Imam Ali v. Poresb Mundu*(1), was one of prescription, i.e., of an easement. In none of these cases have the Indian Courts declared that the right of the upper owner operates as an easement over the lower land. In the present case the plaintiff, the owner of land in a town, has the right to enclose his plot, or to build upon it [cf. illustration (a) to section 7 of the Easements Act]; and if that right comes in conflict with the natural right of the upper owner to take advantage of the situation of his land, it seems to me that the latter must give way unless the former is to be unduly restricted, for, in this way only can the full enjoyment of the right of the lower owner be secured.

I, therefore, concur in the order proposed by my learned colleague. The appeal is allowed, the decree of the Lower Appellate Court is set aside, and the plaintiff will have a decree for damages in the amount of 10 rupees, the injunction as stated in my colleague's judgment, and his costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice Sankaran Nair.

MANIKKA VASAKA DESIKAR ALIAS GNANA SAMBANDA
PANDARA SANNADHI (SECOND DEFENDANT—SECOND
COUNTER-PETITIONER), APPELLANT,

1906.
March 18, 21.

v.
BALAGOPALAKRISHNA CHETTY (PLAINTIFF—PETITIONER),
RESPONDENT.*

Hindu Law—Religious endowment—Decree against head of mutt binds successor in execution proceedings—Decree on promissory note executed by head of mutt binds the mutt—Compromise decree, effect of—Parties to suits—Sishyas cannot be made parties.

A decree passed against the head of a mutt as representing the mutt is binding on his successor who cannot dispute the validity of the decree in execution proceedings but can do so only by a properly framed suit.

Sudindra v. Budan, (I.L.R., 9 Mad., 80), referred to and followed.

(1) I.L.R., 8 Calo., 468.

* Civil Miscellaneous Second Appeal No. 67 of 1905, presented against the order of F. D. P. Oldfield, Esq., District Judge of Tanjore, in Appeal against Order No. 67 of 1905, presented against the order of M.R.Ry. T. T. Rangachariar, Subordinate Judge of Kumbakonam, in Execution Petition No. 139 of 1904 in Original Suit No. 56 of 1901.

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The head of the mutt represents the mutt even when the suit is brought on a promissory note executed by him and he cannot therefore question the validity of the transaction.

The binding nature of the decree in such cases is not affected by the fact that it is based on a compromise. The sishyas or disciples of a mutt are not co-owners with the head of the mutt and have no such interest in the mutt property as will entitle them to be made parties in a suit to recover property from the head of the mutt.

This appeal arose out of the proceedings in execution of the decree in Original Suit No. 56 of 1901 on the file of the Subordinate Court of Kumbakonam.

The facts necessary for this report are set out in the judgment.

P. R. Sundara Ayyar and *T. Narasimha Ayyangar* for appellant.

The Hon. Mr. *V. C. Desikachariar* for respondent.

JUDGMENT.—The plaintiff in Original Suit No. 56 of 1901 sued the Pandara Sannadhi of Dharmapuram Athinam for the recovery of a certain sum of money due on a promissory note executed by him for articles purchased, according to the plaintiff, "for the necessary use of the said athinam" and he prayed for a decree directing payment "by the defendant and from the funds of his athinam mutt." A razinamah decree was passed which provided for the recovery of the amount decreed "from the properties of Dharmapuram athinam mutt, of which the defendant is trustee."

The defendant resigned the office of Pandara Sannadhi in favour of the appellant, who has been made a party to the execution proceedings taken by the decree-holder to execute the decree by attachment and sale of the mutt properties. The appellant raised the contention that the decree cannot be enforced against the mutt properties. The Subordinate Judge following the decision in *Vidyapurna Tirthaswami v. Vidyaniidhi Tirthaswami*(1) held that the Pandara Sannadhi had full control over the income of the mutt properties and that it was not open to him by relinquishing his position to deprive the creditor of his power to recover his debt from the income of the mutt during the lifetime of the Pandara Sannadhi. The District Judge was of opinion that these questions could not be decided in execution proceedings and that the appellant's only remedy was to set aside the decree by a suit.

In *Sudindra v. Budan*(2) it was held by HUTCHINS and PARKER, JJ., following the Privy Council decision in *Prosunno*

(1) I.L.R., 27 Mad., 435.

(2) I.L.R., 9 Mad., 80.

Kumari Debya v. Golab Chand Baboo(1) that a decree passed against the trustee of a mutt is binding on his successor upon whom lies the onus of coming forward and taking steps to set aside a decree, which as it stands is binding upon the mutt as represented by him, and that in execution proceedings he cannot be allowed to dispute the correctness of the decree.

The decree which is now sought to be executed was clearly passed against the Pandara Sannadhi as the representative of the mutt and the decree-holder is, as held in the decision cited, entitled to enforce it against the appellant as the present representative of the mutt, subject to his right to set it aside for adequate reasons in a properly framed suit.

But it is contended before us that the decree is void, because the Pandara Sannadhi did not represent the mutt in a suit brought upon a promissory note executed by himself, as it was not open to him to question the binding nature of the transaction, and secondly, the decree was based upon a razinama. It is suggested that it was therefore necessary to make the sishyas or disciples parties to the suit to make the decree binding on the mutt.

The sishyas or disciples are not co-owners; nor have they got such interest in the mutt property as would entitle them to be made defendants in a suit to recover money or property from a Pandara Sannadhi. In the case in *Sudindra v. Budan*(2), the settlement of accounts on which the suit was brought was made with the defendants who were accordingly precluded from contesting its validity, and yet the decree was held binding so far as the execution proceedings were concerned. The contention that the Pandara Sannadhi was not the representative by reason of his having executed the promissory note must therefore be disallowed.

Nor can the other contention be supported. It would be unreasonable to hold that a Pandara Sannadhi is bound to waste mutt property in litigation when it is in the interests of the mutt to enter into a compromise. The decree based on the compromise must therefore be held to be binding in these proceedings. See *Chintaman Vithoba v. Chintaman Bajaji*(3).

(1) 14 B.L.R., 450.

(2) I.L.R., 9 Mad., 80.

(3) I.L.R., 22 Bom., 475.

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APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Moore.

ARUNACHELLAM CHETTIAR AND ANOTHER (PLAINTIFFS),
PETITIONERS,

v.

KADIR ROWTHEN (DEFENDANT), RESPONDENT.*

Limitation Act XV of 1877, s. II, art. 110—Rent in arrear from date on which it is due by contract or custom, when such rent ascertained and not in dispute.

Rent, when the amount is ascertained, is in arrear, within the meaning of article 110 of schedule II of the Limitation Act from the date on which it is due by express contract or custom irrespective of the end of the fasli or of the exchange of patta and muchilika.

Where the melawram share due to the landlord is payable by custom as soon as the harvest is over, the rent is ascertained and payable at the end of the harvest and a suit for rent will be barred if not brought within three years of such date.

Rangayya Appa Rao v. Bobba Sriramulu, (I.L.R., 27 Mad., 143), distinguished.

Although tender of putta is a condition precedent to proceedings for the recovery of rent, there is nothing in the Rent Recovery Act or the Limitation Act to make the date of such tender the starting point of limitation in such cases.

SUIT to recover rent.

The District Munsif dismissed the suit.

Plaintiff applied to the High Court under section 25 of Act IX of 1887.

The facts necessary for this report are set out in the judgment.

S. Srinivasa Ayyangar for petitioner.

P. R. Sundara Ayyar for respondent.

JUDGMENT.—In this case the plaintiffs, the landlords, sued the defendant, their tenant for Rs. 25-8-8, the value of the share of produce (melvaram) alleged to be due from the tenant for fasli 1310, i.e., the year ending 30th June 1901. The harvest was reaped in February 1901. The patta was tendered on the 28th June 1901. The suit was filed on the 8th April 1904. It was found by the District Munsif that the melvaram was by custom due immediately after the harvest was gathered when the share of

* Civil Revision Petition No. 100 of 1905, presented under section 25 of Act IX of 1887, praying the High Court to revise the decree of M.R.By. S. Ramaswamy Ayyangar, District Munsif of Paramakudy, in Small Cause Suit No. 395 of 1904.

the landlord is divided from the tenant's share, that is, in the present case, in February 1901. He therefore dismissed the suit as barred by limitation, having been brought more than three years after the date when the rent was due.

We are asked to revise this decision on the ground that the rent cannot be held to be in arrear until the landlord can sue for it, and that section 7 of the Rent Recovery Act VIII of 1865 prohibits the landlord from recovering the rent until after patta has been exchanged or tendered. The petitioner relies on the decision of the Privy Council in the case of *Rangayya Appa Rao v. Bobba Sriramulu*(1).

We do not think that that case has any application to the facts of the present case. That was a case in which there was a dispute as to the amount of rent payable, and proceedings were taken before the Collector and in the Civil Courts to determine the amount of rent payable. What the Privy Council decided was that in such a case "as long as proceedings are pending before the Collector, and, on appeal from him, before the Civil Courts, the rate of rent is in suspense, for no one can tell what it will prove to be, and that therefore no arrear of rent can be said to have become due within the meaning of the Limitation Act." They point out that in the Act the falling due of rent means the falling due of an ascertained rent, and that the provisions of the Act as to rent due, rent in arrear and the recovery of rent refer to ascertained rents. In the present case, however, the rent was ascertained as soon as the harvest was reaped. The Privy Council expressly point out that though in most cases the point of time at which rent becomes due is the close of the period in respect of which it is to be paid, this is not necessarily the case, and that legislation, custom, or express contract, or the special circumstances of any case, may make rent become due at a point of time different from the close of the period in respect of which it is to be paid, and that in India, by the custom of the country, agricultural rents are often payable before the close of the fasli year. There is nothing in the decision or in the grounds on which it is based, to support the contention that, where the rent is ascertained and is payable, as in this case, on some date before the close of the fasli year, the period of limitation does not run from such date,

(1) I.L.R., 27 Mad., 143.

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but runs either from the close of the fasli or from the date of the tender of patta. It is true that the tender of patta is a condition precedent to proceedings for the recovery of rent, but there is nothing either in the Rent Recovery Act, or in the Limitation Act, or in the decision of the Privy Council which is relied upon, to render the date of such tender, in a case like the present, the date from which limitation begins to run.

There is nothing to prevent the landlord from tendering the patta early in the fasli, and it would be strange if his delay in doing so should operate to postpone the starting point of limitation after the rent was ascertained and was payable.

We must therefore dismiss the petition with costs.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

THOMAS (PRISONER), APPELLANT,

v.

EMPEROR, RESPONDENT.*

Criminal Procedure Code Act V of 1898, ss. 222, 234—Criminal breach of trust—Joinder in one trial of charges for two distinct items with another for a gross sum is not illegal—Construction of statute.

Under section 222 of the Code of Criminal Procedure a charge of criminal breach of trust in respect of a gross sum, without specifying the items, is a charge for one offence within the meaning of section 234.

Section 222 of the Code of Criminal Procedure does not apply only to cases where there is a general deficiency and the prosecution is unable to specify the particular items of the deficiency, but also to cases where the items may be, but are not, specified.

The joinder in one trial of charges of criminal breach of trust in respect of two distinct items with a charge in respect of a gross sum (the items constituting which may be but are not specified) is a joinder of only three charges, and is not bad as contravening the provisions of section 234 of the Code of Criminal Procedure.

"The essence of a Code is to be exhaustive on the matter in respect of which it declares the law and it is not the province of Judge to disregard or go outside the enactment according to its true construction."

Subrahmanya Ayyar v. King-Emperor, (I.L.R., 25 Mad., 61), distinguished.

* Criminal Appeal No. 8 of 1906, presented against the sentence of L. E. Buckley, Esq., Sessions Judge of Nilgiris Division, in Case No. 6 of the Calendar for 1905.

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In this case the accused was tried on charges of criminal breach of trust in respect of two cheques for Rs. 18 and 54 and also on another charge in respect of a sum of Rs. 60 made up of three distinct items. The charge last-mentioned, however, was in respect of the gross sum of Rs. 60 and did not specify the items of which it was composed.

The accused was convicted on the first two charges and acquitted on the third.

On appeal to the High Court by the accused it was contended that the trial was in fact on five distinct charges, as the last charge must be treated as a charge of three distinct offences and that the trial was accordingly in contravention of section 234 of the Code of Criminal Procedure.

Mr. A. S. Cowdell for appellant.

The Public Prosecutor for respondent.

JUDGMENT.—In this case the appellant was the head clerk and cashier in the firm of Rungiah Gowndan & Co. He has been convicted of criminal breach of trust by a servant under section 408 of the Indian Penal Code, in respect of two cheques for Rs. 18 and Rs. 54, respectively. He has been acquitted on a similar charge with respect to a sum of Rs. 60. This charge, as at first framed, was in respect of Rs. 611-11-0 and the items said to have been comprised in that sum numbered some 15 or 20 small sums. At the trial this charge was amended by reducing the amount to Rs. 60, which is the total of three items which, though not specified in the charge, might have been specified, and in respect of which separate evidence was, in fact, given. This amendment of the charge simplified it in the interest of the accused and it was clearly legal with reference to section 227, Criminal Procedure Code.

But the chief point taken in appeal is that as the sum of Rs. 60 in the third charge, as amended, was, in fact, made up of three separate items which could have been specified and which might have each formed the subject of a separate charge, the accused was really called on to defend himself against five charges in all (including the charges in respect of the two cheques), and that the trial was therefore illegal with reference to section 234, Criminal Procedure Code, and the decision of the Privy Council in the case of *Subrahmanya Ayyar v. King-Emperor*(1). The case relied on has

(1) I.L.R., 25 Mad., 61.

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no application, since it did not relate to an offence of criminal breach of trust for which section 222, Criminal Procedure Code, makes a special provision which is in the nature of an exception to the general rule. The general rule is that stated in section 233 of the Criminal Procedure Code, viz., that "for every distinct offence of which a person is accused there shall be a separate charge and every such charge shall be tried separately," except in certain cases. One of these cases is that stated in section 234 which allows three separate offences of the same kind committed within the space of twelve months to be charged and tried at one trial, section 222 makes, in effect, a further extension of this rule by enacting that "when an accused person is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular items on exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234, provided that the time included between the first and last of such dates shall not exceed one year." In the present case the third charge as amended, and even as it originally stood, must, therefore, be deemed to be a charge of one offence only, and section 234 allows three offences of the same kind to be tried together, provided all were committed within the space of twelve months from first to last. In the present case the two offences in respect of the two cheques and the offence in respect of the sum of Rs. 60 were all committed within that space of time, and the trial for all three offences together was therefore legal. We cannot accede to the argument of the learned counsel for the appellant that section 222 is only intended to apply to cases where there is a general deficiency in an account and the prosecution is unable to specify the particular items of the deficiency. Had the Legislature intended to provide for such cases only, it could have found apt words in which to express the intention. The words used do not contain any such limitation and we are not justified in reading into the section a limitation which its language will not support. As observed by the Privy Council in a recent case "The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true

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construction" (*Cokal Mandar v. Padmanund Singh*(1)). We may add that the accused is not in a worse, but is in a better, position when the items can be, and are, specified, rather than when they cannot be, or are not, specified. The view that we take is supported by the decisions of the High Courts of both Allahabad and Calcutta (*Emperor v. Gulzari Lal*(2), *Emperor v. Ishtiaq Ahmad*(3), and *Samiruddin Sarkar v. Nibaran Chandra Ghose*(4)) and we are not aware that a contrary view has been taken by any of the High Courts.

The trial was therefore not illegal by reason of the charges on which the accused was tried. On the merits we are satisfied that the accused was rightly convicted in respect of the two cheques which formed the subject of the first and second charges.

We dismiss the appeal.

APPELLATE CRIMINAL.

Before Mr. Justice Davies and Mr. Justice Moore.

SREEMAN KUMARA TIRUMALRAJA BAHADUR,
RAJAH OF KARVETNAGAR, PETITIONER,

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SOWCAR LODD GOVIND DOSS KRISHNA DOSS,
RESPONDENT.*

Criminal Procedure Code Act V of 1898, s. 145—Enquiry to be held before issuing preliminary order under—Jurisdiction of Magistrate—Failure of jurisdiction where Magistrate refuses to receive evidence which party is entitled to adduce under s. 145 (5).

In order that a Magistrate may have jurisdiction to act under section 145 of the Code of Criminal Procedure, he must be satisfied from a Police report, or other information, that a dispute likely to cause a breach of the peace exists concerning any land, etc. Where there is no Police report the statement of interested parties ought to be received with great caution and ought not to be acted upon unless they are corroborated by the testimony of less interested persons. The opposite party also, ought to be given an opportunity of

(1) L.R., 20 I.A., 196.

(2) I.L.R., 24 All., 254.

(3) I.L.R., 27 All., 69.

(4) I.L.R., 31 Cal., 928 at p. 931.

* Criminal Revision Case No. 209 of 1906, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of Stanley Rice, Esq., District Magistrate of North Arcot in Criminal Miscellaneous Petition (No. 1 of 1906.

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cross-examining the party making such statements before the Magistrate takes any action on them.

Under section 145 of the Code of Criminal Procedure, a party who is required by a preliminary order to attend at the Magistrate's Court is entitled to show that no dispute likely to cause a breach of the peace exists or had existed, and it is not open to such Magistrate to refuse to receive such evidence when tendered. Where the Magistrate refuses to receive such evidence, his order will be set aside as having been passed without jurisdiction.

Per DAVIES, J.—A Magistrate acts *ultra vires* in clubbing together disputes relating to a large number of villages and treating them as one. Each village must stand on its own footing and the Magistrate should satisfy himself that a dispute existed in respect of all the villages. He should ascertain, as regards each village, which party was in possession at the date of the order and confirm that possession.

The object of Chapter XIV of the Code of Criminal Procedure being to procure prompt action to avert breaches of the peace, the Legislature could not have contemplated under that chapter wholesale proceedings in regard to a large number of villages which, if the procedure above stated be adopted, would entail a prolonged enquiry.

THE facts necessary for this report are fully set out in the order of the lower Court, the material portions of which are as follows:—

"The estate of Karvetnagar was until lately under the management of the Court of Wards, who handed it back to the Rajah of the Karvetnagar on 27th September 1905. While doing so, they restored possession of the Narayanavanam Taluk to the petitioner who was the usufructuary mortgagee. The Rajah immediately issued a notice to the ryots that he had come into possession and this has caused unrest. Hence the application.

"The facts are very clearly stated by my predecessor in his order of 9th March 1906, and I here embody it with this order.

"The Narayanavanam Taluk was mortgaged with possession to Dewan Bahadur Lodd Kristna Doss Bala Mukund Doss (father of the petitioner) on July 20, 1878, and was in possession of the usufructuary mortgagees subsequent to that date until management was assumed by the Court of Wards under Act IV of 1899. On the 13th June 1905 the incapacitated proprietor (the father of the counter-petitioner) died and the Court of Wards having decided to relinquish the superintendence and managements of the estate, restored the possession of the Narayanavanam Taluk to the usufructuary mortgagee on the 27th September 1905.

"It appears from the affidavit of R. Subramania Ayyar, the Deputy Tahsildar of the mortgagee in possession, that on the very

day that possession was given to the mortgagee the counter-petitioner issued notices to the ryots and village officers to the effect that possession of the taluk had passed to him and not to the mortgagee and that rents were to be paid and accounts rendered to him alone and not to the mortgagee.

"On this being brought to the notice of the Regulation Collector, that officer caused a notice to be promulgated in the villages by beat of drum informing the ryots and village officers of the true facts.

"The records of this case also show that a copy of the notice was obtained and supplied to the Collector and District Magistrate who communicated with the counter-petitioner in the hope of inducing him to recall the notice to the ryots and refrain from action that appeared as illegal, as it was ill advised and was likely to lead to a disturbance of the public tranquillity.

"The affidavit of the Deputy Tahsildar of petitioner shows that the Karvetnagar Rajah without paying the least attention to the disinterested advice given him by the Chief Magistrate of the District, has made further determined efforts to gain possession of the taluk by force instead of through the proper Courts. He has opened a Taluk Office of his own in the taluk and is employing every means to induce the ryots and village officers to attorn to him.

"The action of the counter-petitioner, even if he *bonâ fide* believes that possession "passed" to him on the surrender of management by the Court of Wards, cannot but lead to breaches of the peace and disturbances throughout the taluk, and paragraphs 19 to 25 of the Deputy Tahsildar's affidavit recount what I must consider are only the mutterings of the coming storms.

"Being satisfied then that a dispute likely to cause a breach of the peace exists regarding the possession of the Narayanavanam Taluk of the Karvetnagar Zamindari which is within the local limits of my jurisdiction, I make this order in writing in which I have stated above the grounds of my being so satisfied and I hereby require the parties concerned in the dispute to attend this Court in person or by pleaders within the next 10 (ten) days and to put in written statements of their respective claims as respects the fact of *actual possession* of the subject of dispute.

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"The two special points on which the enquiry was to proceed were these;—(1) is there any likelihood of a breach of the peace; (2) in whom does the actual possession vest.

"It is for these reasons that I declined to take oral evidence to the effect that no breach of the peace has taken place or was to be apprehended. It is evident that relations are even now strained to the point of breaking.

"Next it is argued that the Raja can show that whole villages have entirely attorned to him and that such partial possession should be declared to be with him. I see no reason for splitting up the case in this way. The question is, what is to be the unit? In this case, it has been taken to be the taluk. The office is administering the Taluk as a whole and not merely a bundle of unconnected villages in it. Would it be possible if the dispute were about a village to say that the dry lands were in possession of one party and the wet of another, or that of his wet lands certain survey numbers were possessed by one party and certain others by the other? or that a sub-division of a field was in possession of A and the rest of B? where can the line be drawn? I am clearly of opinion that as the dispute is about the Taluk the order should deal with the Taluk as a whole."

Against this order the petitioner preferred a Revision Petition.

The Hon. the Advocate-General (Mr. J. E. P. Wallis) and the Hon. Mr. L. A. Govindaraghava Ayyar for petitioner.

The Acting Public Prosecutor (Mr. C. Sankaran Nair), P. R. Sundara Ayyar and A. S. Balasubrahmaniam Ayyar for respondent.

ORDER—MOORE, J.—In order that a Magistrate may have jurisdiction to act under section 145, Criminal Procedure Code, he must be satisfied from a Police report or other information that a dispute likely to cause a breach of the peace exists concerning any land, etc. It is therefore necessary to ascertain what information Mr. Pinhey, District Magistrate, North Arcot, had before him when he passed his order of the 9th March 1906, and Mr. Rice who succeeded him as District Magistrate, when he passed his final order in this matter on the 2nd April. From Mr. Pinhey's order it is clear that he had no Police report before him. He was

District Magistrate. He believed that there was serious danger of riots breaking out all over a whole taluk in one of the zamindaris in his district, and yet as far as can be ascertained from the record, he never referred the matter to the District Superintendent of Police for enquiry and report, or obtained any information from that officer or any of his Subordinates in the Police before he jumped to the conclusion that there was a danger of riots all over a considerable tract of country. All that the District Magistrate had before him was a petition from a Deputy Tahsildar in the employment of Mr. Lodd Govinda Doss, the mortgagee who had taken over possession from the Court of Wards. Mr. Lodd Govinda Doss was, it is clear, most anxious that the District Magistrate should take action under the Criminal Procedure Code and decide that he was in possession. The facts being as stated it must be held that the District Magistrate should have received the Deputy Tahsildar's statements with great caution and should have declined to act on them unless they were corroborated by some less interested person. This official should also have been summoned before the District Magistrate and examined on oath, full opportunity being given to the Vakil of the Raja of Karvetnagar to cross-examine him more especially as to the statements that he makes in his petition as to the danger of riots breaking out in various villages in the taluk. Nothing of the sort, however, was done and Mr. Pinhey, considering that the action that had been taken by the Raja on the surrender of the management by the Court of Wards, could not but lead to breaches of the peace and disturbances throughout the taluk placed on record in his order of the 9th March 1906 that he was satisfied that a dispute likely to cause a breach of the peace existed, and directed the parties concerned in the dispute to attend at his court within ten days. Mr. Rice took the matter up and passed final orders on the 2nd April. He stated in his proceedings that the facts of the case had been clearly set out by his predecessor, and he accordingly embodied Mr. Pinhey's order of the 9th March in his proceedings. He then went on to add that as each party was claiming possession of the taluk and trying to collect rents and get leases executed to distrain, and generally to exercise acts of ownership, he was satisfied that a collision was inevitable sooner or later. The vakil for the Raja of Karvetnagar wanted to produce evidence to show that there was no danger of a breach of the peace. The District Magistrate,

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however, refused to receive any evidence. It is clear that in so refusing Mr. Rice acted contrary to law. Section 145, clause 5 of the Criminal Procedure Code, lays down that nothing in that section shall preclude any party required by a preliminary order to attend at the Magistrate's Court, as the Raja had been required, from showing that no dispute likely to cause a breach of the peace existed, or had existed, and it was consequently not open to the District Magistrate to refuse to receive the evidence tendered to him. I feel very doubtful if it could be held that the petition of the Deputy Tahsildar afforded information such as to give Mr. Pinhey jurisdiction to pass his order of March but however this may be, I have no hesitation in holding that Mr. Rice's subsequent refusal to receive evidence gives this Court no option but to declare that his order of April was passed without jurisdiction and to direct that it be on that account set aside.

DAVIES, J.—I concur throughout with my learned colleague. I would go even further and hold that *ab initio* the District Magistrate acted *ultra vires* in clubbing together 230 alleged subjects of dispute and treating them as one. Each village stood on its own footing. The Raja had possession of some and the mortgages of others. Before the District Magistrate made his declaration that there was a dispute likely to lead to a breach of the peace, he should have found that that was so in respect of all the villages, but as Mr. Justice Moore has pointed out he had no materials for saying that such a dispute existed in respect to a single village.

Then, when he came to the question of possession he should have decided which party at the date of his order was in actual possession of this or that village and confirmed that possession. Here without taking any evidence on the point he has arbitrarily found that the mortgagee was in actual possession of all the villages, which, as a matter of fact, we understand he was not. This course would no doubt have entailed a prolonged enquiry a circumstance which itself indicates that the Legislature did not contemplate wholesale proceedings of this sort in cases under chapter XIV of the Code of Criminal Procedure, the object of which is to procure prompt action to avert breaches of the peace. Had the provisions of the Code been strictly followed the cases before us could not have been disposed of in so offhand a fashion.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice
Subrahmanya Ayyar.

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Criminal Procedure Code—Act V of 1898, s. 562—Power conferred by section not confined to Courts of First Instance.

The power of passing orders under section 562 of the Code of Criminal Procedure is not confined to Courts of First Instance.
Emperor v. Birch, (I.L.R., 24 All., 306), approved.

THE facts necessary for this report are set out in the letter of reference which is as follows:—

"The appellant Narayanaswami Naidu, a youth of 21 years of age, appears to have been keeping a woman named Govindammal. On the 13th March 1906 he could not find her and on making enquiries seems to have been informed by some one that she was concealed in the house of one Chinnasami Pillai. Thereupon at 2 A.M. he entered Chinnasami Pillai's house, demanded his concubine, and raised such a disturbance that the police had to be summoned. The appellant was convicted after trial of offences under sections 447 and 352, Indian Penal Code, and sentenced to undergo rigorous imprisonment for two weeks. On appeal the Deputy Magistrate affirmed the conviction (he should more approximately have altered it to one under sections 448 and 352, Indian Penal Code), but remitting the sentence, in view of the trivial nature of the offence and the youth of the appellant, directed under section 562, Criminal Procedure Code, that he should enter into a bond for Rs. 50 with one surety for a like amount to be of good behaviour for six months.

The attention of the Deputy Magistrate was drawn to the fact that the power conferred by section 562, Criminal Procedure Code,

* Case Referred No. 38 of 1906 (Criminal Revision Case No. 185 of 1906) for the orders of the High Court under section 438 of the Code of Criminal Procedure by J. H. Robertson, Esq., District Magistrate of Salem, in his letter, dated 10th April 1906 (No. 550 M.B. of 1906).

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can only be exercised by the Court before whom an offender is convicted by a Magistrate dealing with the matter in the manner provided by section 380. The Deputy Magistrate however relies on the ruling in *Emperor v. Berch* (1) in support of his procedure. With all deference to the learned Judge who gave that ruling, I respectfully submit that it is opposed to the plain wording of section 562 and to the intention of the Legislature. In the statement of objects and reasons against section 423 it is noted that the insertion of clause (d) is rendered necessary by the amendment of section 106.

As regards the merits too it seems doubtful if the offence is so trivial as the Deputy Magistrate thinks. The appellant had no justification for considering that the complainant Chinnasami Pillai was concealing his concubine; Chinnasami Pillai is a man of respectable character and to burst into his house at 2 A.M., and create an uproar is hardly a trivial matter. Further the appellant was also complicated in Criminal Appeal No. 55 of 1906 on the same Deputy Magistrate's file in respect of vexatious charge regarding this very matter and the Sub-Magistrate's order directing him to pay compensation was upheld.

The Acting Public Prosecutor in support of Reference.

JUDGMENT.—We do not think it was the intention of the Legislature by the use of the words "Court before whom he is convicted" in section 562, Criminal Procedure Code, to limit the power of making orders under that section to the Court of First Instance. The proviso to the section appears to us inconsistent with the view that this was the intention of the Legislature.

We agree with the decision in *Emperor v. Birch* (1).

(1) I.L.R., 24 All., 306.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice.

MANAVALA CHETTY (ACCUSED), PETITIONER,

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Penal Code—Act XLV of 1860, ss. 478, 480—Offence of using false trademark—No acquisition of the trademark in the sense used in the English Act necessary under s. 478 of the Indian Penal Code—Criminal Procedure Code, Act V of 1898, ss. 227, 233, 234—Joinder of more than three offences in one trial illegal—Trial not validated by striking out charge to cure such defect after case closed, though before judgment.

A person selling soap not manufactured by P, in a box which bears the name of P as a soap manufacturer, uses a false trademark and is guilty of an offence under section 480 of the Indian Penal Code. It is not necessary to constitute an offence under section 478 that a trademark in the sense in which the word is used in the English Patents, Designs and Trademarks Acts should have been acquired; and the mark is none the less a false mark because it appeared on the box and not on the goods.

Under sections 233 and 234 of the Code of Criminal Procedure, a person cannot be charged with more than three offences at one trial; and the defect cannot be cured, after the accused had pleaded and the case had closed, by amending the charges so as to reduce it to three offences. Although the words in section 227 of the Code of Criminal Procedure are wide enough to warrant a Court in altering a charge by striking out one of the charges at any time before judgment, the section does not warrant the striking out of a charge for the purpose of curing an illegality already committed, and after the mischief which the Legislature intended to guard against had been done.

Subrahmanya Ayyar v. King-Emperor, (I.L.R., 25 Mad., 61), referred to and explained.

THE petitioner in this case was tried and convicted by the Chief Presidency Magistrate under section 482 of the Indian Penal Code for using a false trademark by selling soaps of German manufacture in boxes bearing the trademark of Messrs. A. & F. Pears & Co.

* Criminal Revision Case No. 158 of 1906, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of W. E. Clarke, Esq., Presidency Magistrate at Egmore, Madras, in Calendar Case No. 38989 of 1905.

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The charge originally included more than three offences, but when this was brought to the notice of the Magistrate at the argument after the trial was closed, the charge was amended so as to include only three offences. The portion of the judgment of the Magistrate dealing with this point was as follows:—

“On the facts deposed to by the prosecution witnesses this Court charged accused with offences under sections 417, 420 and 482, Indian Penal Code. In the course of argument it was brought to the Court's notice that the charge was defective as it transgressed the provisions of section 234, Criminal Procedure Code, having included more than three alleged offences committed within the space of twelve months. On March 9 accordingly the Court altered the charge under the provisions of section 227, Criminal Procedure Code, by striking out the offence alleged on August 12, 1905. This course was objected, by Mr. Cowdell, counsel for accused, and the case of *Subrahmania Ayyar v. King-Emperor*(1) quoted in support of his contention but the objection was overruled, as in my opinion, the case quoted did not apply to the circumstances of the present action. My reasons for this ruling need not, I think, be more than very briefly stated and they amount to this. In *Subrahmania Ayyar v. King-Emperor*(1)—the trial was proceeded with on an indictment contravening the provisions of section 234, Criminal Procedure Code. Judgment was pronounced and sentence passed; on appeal the High Court of Madras treated the contravention of section 234 as mere irregularity under section 537, Criminal Procedure Code, and disposed of the case on other counts. This was held improper by the Privy Council. This Court, before argument, was closed and judgment pronounced, cured a defect in the charges which otherwise would have resulted in causing the very evil the Privy Council condemns. Section 227, Criminal Procedure Code, gives the Court power so to cure a defect at any time before judgment is pronounced.”

Petitioner preferred this criminal revision petition.

Mr. T. Richmond and Mr. A. S. Cowdell for the petitioner.

The Crown Prosecutor (Mr. John Adam) in support of the conviction.

JUDGMENT.—The first point raised on behalf of the petitioner in this case was, assuming the prosecution evidence to be true, that

(1) I.L.R., 25 Mad., 61.

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an offence under section 480 of the Indian Penal Code had not been made out. I am of opinion that if the petitioner sold to a customer soap which was not manufactured by Pears in a box upon which the name of Pears appeared as a maker of soap, he used a box with a mark thereon in a manner reasonably calculated to cause it to be believed that the soap contained in the box so marked was manufactured by Pears, and by so doing, he used a false trademark and was guilty of an offence under the section. The argument that it had not been shown that Pears had acquired a trademark, in the sense in which the word is used in the English Patents, Designs and Trademarks Acts, in the design which is printed on the box in which the soap was sold, is beside the point. Under section 478 of the Indian Penal Code, “Trade-mark” includes any trademark which is registered under the English Acts, but by the same section the term is expressly defined to mean a mark used for denoting that goods are the manufacture or the merchandise of a particular person. In my opinion the mark is none the less a false mark because it appeared upon the box in which the goods were sold and not upon the goods themselves.

The second point raised on behalf of the petitioner was that the conviction was bad inasmuch as the petitioner had been charged with more than three offences in contravention of sections 233 and 234 of the Code of Criminal Procedure. In connection with this point the facts appear to be as follows:—

The petitioner was charged with an offence alleged to have been committed on August 12, 1905, and with three other offences alleged to have been committed on August 13, August 17 and September 30 of the same year. He was charged with these offences and he pleaded not guilty to all the charges. Evidence was adduced on behalf of the prosecution and on behalf of the defence, and the case was closed. In the course of the argument of counsel after the close of the case the attention of the Court was drawn to the fact that the petitioner had been charged with more than three offences. Thereupon the Magistrate purporting to act under section 227 of the Code struck out the charge relating to the offence alleged to have been committed on August 12. The petitioner's counsel objected to this being done. The Magistrate states in paragraph 8 of his judgment that, except for the purpose of the defence, he does not propose to notice the

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evidence of the witnesses who spoke to the offence alleged to have been committed on August 12th. The Magistrate did not convict the petitioner of any specific offence with reference to the dates specified in the charge, but he convicted him, in general terms, of "an offence under section 482 of the Indian Penal Code."

I do not think it was open to the Magistrate at the stage of the proceedings when he struck out the charge to amend the charge so as to reduce the offences to three. Section 233, Criminal Procedure Code, lays down the general rule that for every distinct offence there must be a separate charge. Section 234 qualifies the general rule by providing that, in certain cases, an accused person may be charged with and tried at one trial for not more than three offences. If the prosecution seek to have the benefit of the exception which modifies the general rule, it is, of course, for them to show the case falls within the terms of the enactment which provides for the exception. In the present case the charge was not amended until after the petitioner had been charged with four offences, had pleaded to four offences and evidence had been adduced on both sides with reference to four offences. It may be that the words of section 227 are wide enough to warrant a Court in altering a charge by striking out one of the charges at any time before judgment; but it seems to me the section does not warrant the striking out of a charge for the purpose of curing an illegality which had already been committed. One of the objects of the limitation contained in section 234 is to prevent the accused being embarrassed by a multiplicity of charges. I am unable to hold that a charge which is bad on the face of it can be cured by an amendment made at a stage of the proceedings when the mischief which the Legislature intended to guard against by the enactment which has been contravened, may already have been done.

The learned Magistrate was of opinion that the observations of Lord Halsbury in delivering the judgment of the Privy Council in *Subrahmania Ayyar v. King-Emperor*(1) did not apply to this case, since in this case the defect in the charge was cured before judgment was pronounced. It seems to me that Lord Halsbury's observations are applicable to the facts of this case.

With reference to the case of *Subrahmania Ayyar v. King-Emperor*(1), I may observe that the real point in that case was

(1) I.L.B., 25 Mad., 61.

not—as seems sometimes to be assumed whether the charging with and trying for more than three offences at one time could be regarded as an error, omission or irregularity within the meaning of section 537 but whether, under article 26 of the Letters Patent the Court had power to adopt the course which was taken in that case.

I am of opinion that the conviction in the present case was bad and must be set aside. I accordingly set it aside and order a new trial.

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